

No. 13658

United States
Court of Appeals
For the Ninth Circuit.

MILTON H. OLENDER,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

Transcript of Record
In Three Volumes
Volume III
(Pages 937 to 1421)

Appeal from the United States District Court for the
Northern District of California,
Southern Division.

FILED

MAY 14 1953

PAUL E. OLSEN

No. 13658

United States
Court of Appeals
For the Ninth Circuit.

MILTON H. OLENDER,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

Transcript of Record
In Three Volumes
Volume III
(Pages 937 to 1421)

Appeal from the United States District Court for the
Northern District of California,
Southern Division.

WILLIAM F. GAHURA

called by the Government, sworn.

The Clerk: Please state your name, your address and your occupation to the Court and Jury.

A. William F. Gahura. I work for the Security First National Bank of Los Angeles, Fresno Branch, Assisant Branch Manager.

Q. Your address?

A. I live at 270 Yosemite, Fresno, California.

Direct Examination

By Mr. Drewes:

Q. Mr. Gahura, you are an employeee of the Security First National Bank in Fresno?

A. Yes, I am.

Q. As such you have access to the official records of that bank?

A. Yes, I do.

Q. In response to a subpoena which has been served upon you, have you brought with you the records pertaining to a savings account in the name of Mrs. J. Olender?

A. Yes, I did. [987]

Q. May I see them?

A. (Witness producing.)

Q. In addition to the ledger cards do you have withdrawal slips?

A. For the year '44.

Q. Yes. Give me what you have?

A. All right. (Witness producing.)

Q. Were these records kept in the ordinary course of business, Mr. Gahura?

A. Yes, they are.

(Testimony of William F. Gahura.)

Q. Do you have photostatic copies with you of these records? A. No. Not of those.

Mr. Drewes: Will it be stipulated that these may go into evidence?

Mr. Lewis: Yes.

Mr. Drewes: They will be so offered.

The Court: They may be marked.

The Clerk: U. S. collective Exhibit No. 53 in evidence.

(Thereupon bank records, Security National Bank, Fresno, California, were received in evidence and marked U. S. Exhibit No. 53.)

Q. (By Mr. Drewes): I hand you Government Exhibit No. 53, Mr. Gahura, State if you will, Mr. Gahura, whether the [988] records of the account which you have in front of you show that on July 5, 1944, a withdrawal was made in the amount of \$2500? A. That is correct.

Q. Does the Government Exhibit No. 53 include a withdrawal slip covering that particular withdrawal? A. Yes, it does.

Q. Can you state what the ultimate disposition of that sum of \$2500 was? A. No, I cannot.

Q. And why can't you?

A. The records were mislaid or lost. We are unable to find them.

Q. You have searched for them?

A. We searched for them for two days?

Q. You were unable to find them?

A. We are unable to find them.

(Testimony of William F. Gahura.)

Q. Are you able——

Mr. Hagerty: Then, if your Honor please, I will move to strike this as being incompetent, irrelevant and immaterial. There is no connection shown, that last question in reference to other records having been lost, as having any bearing or relationship with the issues in this case.

Mr. Drewes: I think it is pertinent, your Honor, to [989] establish there is no documentary evidence in connection with this particular withdrawal which will support or, for that matter, impeach testimony which is in the record.

The Court: I will overrule the objection.

Mr. Hagerty: We have no objection, your Honor, to the statement of withdrawal, but the ultimate disposition as to what became of it, that is what we are objecting to.

Q. (By Mr. Drewes): Are you able to state, Mr. Gahura, whether the withdrawal which is reflected on the ledger account was made in cash or otherwise? A. No, I cannot.

Mr. Drewes: No further questions.

Mr. Hagerty: We have no questions, your Honor.

(Witness excused.)

The Court: The witness is excused.

ROLAND HELLMAN

resumed the stand, and having been previously duly sworn, testified further as follows:

Cross-Examination

By Mr. Drewes:

Q. Mr. Hellman, you have testified that you are a licensed public accountant? A. Yes.

Q. Licensed by the State Board of Accountancy in the State of California? [990]

A. That's correct.

Q. When were you so licensed?

A. March 15, 1946.

Q. And you have also testified you were employed by the Bureau of Internal Revenue?

A. Yes.

Q. And you said something over five years, is that correct? A. Five and a half years.

Q. Five and a half years. Are you a certified public accountant, Mr. Hellman? A. No, sir.

Q. Do you have before you, Mr. Hellman, the illustration of net worth and net worth statement?

A. The illustration that was presented——

Q. Yes. A. As an example?

Q. As an example.

A. Of a simple net worth?

Q. Yes. A. Yes, I have a copy of it here.

Q. Did you not include in that illustration any reference to a treatment of non-taxable income?

A. No, there is no treatment of non-taxable income in there. This——

(Testimony of Roland Hellman.)

Q. However, earlier this morning you testified that [991] non-taxable income would be included in your calculations?

A. The calculation of what?

Q. In connection with your testimony this morning you referred to non-taxable portion of capital gains? A. That's right.

Q. And so the extent that non-taxable item is pertinent in the study of net worth, they would be included, would they not? A. Normally.

Q. And what is the effect?

A. I previously stated—You mean earlier?

Q. Yes. A. My testimony?

Q. Yes. A. The effect of—

Q. How is it treated?

A. —of non-taxable gains or the non-taxable portion?

Q. The non-taxable portion.

A. Non-taxable portion of capital gains result in the net worth increasing, but in computing net income based upon net worth method you would reduce the increase in net worth to arrive at the net income by the amount of the capital gain that is not taxable.

Q. That portion which is not taxable?

A. That's right. [992]

Q. You have not included in your illustration of net worth an example of an unallowable loss. If pertinent, would an unallowable loss be included in the calculation of the net worth statement?

A. An unallowable loss?

(Testimony of Roland Hellman.)

Q. Yes.

A. To what extent do you mean unallowable?

Q. Well, I am asking you, Mr. Hellman.

A. Well——

Q. If there is a loss which is not allowed, which may not be deducted——

A. Are you referring for tax purposes?

Q. Yes.

A. Well, a loss would—I don't quite—I think you better clarify your question a little bit, Mr. Drewes.

Q. I withdraw the question. You testified, Mr. Hellman, in connection with the unreported capital gain on the sale of the Riverdale Ranch in 1945 that the maximum tax payable was \$504 and might even have been less. Do you recall that?

A. If on the assumption that the capital gain was \$2016, a mathematical computation would show if it were a long term capital gain, 50 per cent of \$2016 would be \$1008, subject to a maximum tax of 50 per cent. I believe the year '45 under both methods computed, the income would be over the 50 per cent bracket. Therefore it would be limited to a [993] 50 per cent of half of the capital gain.

Q. That is the testimony to which I referred. I now show you the Government Exhibit No. 2, Mr. Hellman, which is the taxpayer's return for the year 1946, and I call your attention particularly to Schedule D and point out to you that a loss from sale of the Wilson Avenue property is reflected therein in the amount of \$909.34.

(Testimony of Roland Hellman.)

You see that item, Mr. Hellman? A. Yes.

Q. In connection with your testimony as to the tax due from the Riverdale—sale of the Riverdale Ranch, did you take into consideration the loss from the Wilson Avenue property which is reflected in that return?

A. You mean in these computations that were presented this morning?

Q. No, Mr. Hellman. In connection with your testimony to the effect that if the Riverdale property were sold at a profit of two thousand some odd dollars, as to this taxpayer that the tax due would be \$504. You recall that testimony?

A. I believe so, yes.

Q. Now in connection with that testimony did you take into effect the fact that the taxpayer had taken a loss in 1945 on the sale of the Wilson Avenue property as reflected in that return? [994]

A. That is the 1946 return. The loss on the Wilson Avenue property is in '46. You said he took a loss on the '45 return. This is the '46 return.

Q. What would be the effect of a capital loss reported by the taxpayer if there were a capital gain also realized in the same year?

A. Well, the loss would offset—would be offset either in whole or in part against the capital gain or the gain would be offset in part by the loss—I should say in whole or in part.

Q. The loss could not be taken in full if a capital gain were also claimed, is that correct?

A. No—if there were a capital gain, a capital

(Testimony of Roland Hellman.)

loss, both, they would be offset before you would take the net result into account.

I might add, Mr. Drewes, that this illustration of net worth was made up as an illustration for the Jury and it was deliberately kept simple so as not to confuse them and to give them an elementary example so that we could proceed from there. I didn't attempt to put in any complicated items in there such as the ones that you brought out.

Q. I understand that, Mr. Hellman. But to the extent that an unallowable loss is sustained by the taxpayer in a given year, that would also be taken into consideration in computing net worth, would it not? [995]

A. The unallowable loss, as I gather from your—you are talking about—is probably the stock transaction, and it is money actually—it would come under an item of a non-deductible expenditure if you didn't list it as an asset and if you had taken a strict interpretation, or, as I mentioned earlier, that the average—or as on this illustration of net worth here, pointing out on that, that the average business man construes net worth to mean the value of assets based on current market value, and if a man considered the stock as valueless and did not include it on the net worth statement as an asset, but he had spent five or ten thousand dollars during the year to purchase that stock, it would be taken in on computing the net income on the net worth basis as a non-deductible expenditure.

(Testimony of Roland Hellman.)

Q. Mr. Hellman, the Government Exhibit No. 2 reflects the taxpayer took a deduction of \$990 for a capital loss on the Wilson Avenue property. Is that correct?

A. Just the fact that he took it or the computation?

Q. Just the fact that he took it as shown in that return.

A. Without verifying mathematically the accuracy, which I presume is correct, yes, he did.

Q. If he had sustained a capital gain in the same year, would he have been able to take the entire \$990 as a capital loss?

A. Well, the loss would be—the gain would be offset, or [996] the amount of the loss would be offset against the gain, whether in full or in part.

Q. So if the gain from the Riverdale Property were included in the return, the tax due would be in excess of \$504, would it not?

A. You mean because of the difference in the tax rates between the alternative tax and the regular tax brackets?

Q. No, I don't, Mr. Hellman. A. No.

Q. The records show, Mr. Hellman, that the taxpayer did not report a capital gain in the year 1946 on the sale of the Riverdale property. Is that right?

A. That is right.

Q. Now if that had been reported and the tax thereon had been computed reflecting the capital loss on the Wilson Avenue property, the tax would have been more than \$504, is that correct?

(Testimony of Roland Hellman.)

A. If he is in a bracket over 50 per cent, but if he is in a bracket under 50 per cent, no, it would not.

I have a '45 tax rate schedule here. I can tell you if you want to know.

Q. I will withdraw the question and put it this way, Mr. Hellman. Would not the capital gain on the Riverdale property and the capital loss on the Wilson Avenue property be considered together in determining the tax due on capital gains? [997]

A. They would, but if you had a \$2016 capital gain and if you had a \$909.34 loss, as reported, you would have wound up with the capital—the capital gain would have been reduced by 50 per cent. Therefore the \$2016 capital gain would result in a long term capital gain of \$1008, and if this loss is computed correctly and was \$990.34, he would have had a net capital gain of \$17.66.

Q. Isn't it true that 50 per cent of the loss on the Wilson Avenue property is not allowable if there is a capital gain in the same year?

A. I didn't attempt to determine whether it was mathematically—Let's see.

Q. I am not concerned about the mathematical accuracy.

A. I don't know whether he—I would have to check it to see. Did he reduce the loss by 50 per cent or not?

Q. The Wilson Avenue property? A. Yes.

Q. He did not.

A. That is what I say, I don't know whether he

(Testimony of Roland Hellman.)

did or not, because I haven't checked the computation.

Q. Assuming that he did not reduce the loss by 50 per cent but took the loss in its entirety, would not the 50 per cent of it be not allowable if there was a capital gain in the same year?

A. It would be offset, that's right. You would take the [998] \$990.34 and compare it to the \$2016 again and you would have a net capital gain of \$1025.66, which you would take one-half of. That would be \$512.83 subject to a maximum tax of 50 per cent, and he was not in the 50 per cent bracket in '46 so it would not even result in that much tax, but the fact that he has already taken the \$900 would result in an additional tax, too.

Q. So an additional tax would be due?

A. But not in excess of \$504 that you mentioned.

Q. Your testimony is that it would not—the tax due would not be in excess of \$504 as heretofore testified by you?

A. By taking in—

Q. Will you calculate it, Mr. Hellman, and find out what the tax would be?

A. Give me the tax return back, please. You want me now to take the net income as reported and add in the capital gain, is that correct?

Q. I want you to consider the cumulative effect of the loss of \$909.34 as shown there on the Wilson Avenue property. Consider it with a gain of \$2116.

A. \$2116?

Q. On the Riverdale Ranch.

A. \$2116 or \$2016?

(Testimony of Roland Hellman.)

Q. \$2016.

A. You want me to take the loss as reported and take it as [999] a capital loss, that is, long term, reduce it by 50 per cent?

Q. That's correct.

A. Do you want the tax or the income figure? Do you have Mrs. Olender's return to see if they are on the same bracket? I believe they are.

Q. The tax, Mr. Hellman.

A. They are in a different bracket (witness referring to his records.)

Presuming that the loss reported, the \$990.34 were a capital loss, only allowable at 50 per cent, and the \$2016 capital gain was added to income for the year 1946, the net capital gain would be \$1025.66. The net increase in income would be 50 per cent of the capital gain or \$512.33, with the \$990.34 going out as having already been offset against the capital gain resulting in a net increase in income of \$1502.67.

Computed on the effective tax rate of income over \$10,000, her income was just 19 cents short of \$10,000, as per the return now—the figures are being based on the rate of—of the effective rate—resulting in 542.39 tax.

Q. Then your earlier testimony was not correct, Mr. Hellman?

A. On the facts given me it was correct. But upon the addition of the \$990 item, there is a change in the computation, yes. [1000]

Q. You did not take that \$990?

(Testimony of Roland Hellman.)

A. I wasn't asked. We were using a hypothetical question, Mr. Drewes.

Q. You state that you weren't asked. You mean you weren't asked by your counsel, Mr. Lewis.

A. Mr. Lewis asked me what the additional tax would be if we assumed a capital gain of \$2016 without any reference to any losses or any other points. I merely gave the maximum tax on the capital gain of \$2016.

Q. Mr. Hellman, do you have with you Schedule 1, the analysis of the Goodman transactions?

A. Yes, I have it here. Would you like these exhibits back, Mr. Drewes?

Q. I will take them back.

If your Honor please, this will require our attention for some time. I wonder if this is an appropriate time to recess.

The Court: We might take the noon recess, ladies and gentlemen. Do not discuss the case nor form an opinion until the matter is finally submitted.

(Thereupon an adjournment was taken until two o'clock p.m. this date.) [1001]

(Testimony of Roland Hellman.)

October 2, 1952—2:00 P.M.

ROLAND HELLMAN

called for the defendant, having been previously sworn, resumed the stand and testified further as follows:

Direct Examination

(Resumed)

By Mr. Drewes:

Q. Mr. Hellman, will you tell us when you were first employed by Mr. Olender?

A. I was not employed directly by Mr. Olender. Approximately three or four months ago—I can't remember exactly, Mr. Lewis informed me that there would be some work to do on Mr. Olender's books. At that time——

Q. Did you begin work on the case about three months ago then? A. No.

Q. Will you tell us approximately——

A. I have to qualify that answer because I didn't—It's not complete.

Q. Go ahead.

A. I did look over Mr. Olender's books and briefly, very briefly, orienting myself with them.

Q. Fix the date.

A. To the best of my knowledge, I would say, four months ago.

Q. Approximately how much time have [1002] you——

A. At that time I spent——

(Testimony of Roland Hellman.)

Q. Mr. Hellman—just answer—

A. I am giving you half an answer. You are interrupting my answer.

Q. Mr. Hellman, if you will answer—

A. I hadn't done the actual work in this case until the last three weeks. Three or four months ago I started to do a little work, and it was put off due to the pending stipulation and so forth. I did no more work until approximately three weeks ago.

Q. Thank you, Mr. Hellman. Now I think we will get along better if you will just answer my questions, and if you wish to explain your answer, I am sure you will be given an opportunity by your counsel on redirect examination.

A. I would like to have a chance to answer the question in full when you give it to me, though.

Q. Approximately how much time have you spent on the case Mr. Hellman, just roughly to the best of your recollection?

Mr. Hagerty: Well, if your Honor please, I think that is more or less incompetent, irrelevant and immaterial how much time he spent on it, other than the point that was in question on cross-examination, when he started.

Mr. Drewes: It is a preliminary question, your Honor.

Mr. Hagerty: If he wanted to work 24 hours a day—

A. If it is important— [1003]

The Court: Do you have an estimate?

(Testimony of Roland Hellman.)

A. I can give you better than an estimate. Would you like to know counting my court time, since I have been in court?

Q. (By Mr. Drewes): Exclusive of court.

A. I would say close to a hundred hours.

Q. Thank you. Now, Mr. Hellman, do you have schedule one? A. I do.

Q. Do you have it in front of you?

A. Yes.

Q. I understand, ladies and gentlemen of the jury, you have schedule 1 with you.

Now directing your attention, Mr. Hellman, to the first item that appears thereon, the figure \$20,-550. A. Yes.

Q. Will you state what that represents?

A. The \$20,550 represents the figure of cash described as taken from the safe deposit box in January, in the early part of 1944, to purchase cashier's checks, 9 cashier's checks which were turned over to—which went to Mr. Goodman for the purchase of merchandise.

Q. Were you able to verify that that sum came from the vault as you have just testified?

A. That figure—that is based on Mr. Olender's testimony [1004] that that money, those cashier's checks were purchased from funds in the safe deposit box.

Mr. Drewes: I ask that the answer be stricken as non-responsive, your Honor.

The Court: Yes.

(Testimony of Roland Hellman.)

The question was were you able to determine.

Q. (By Mr. Drewes): Were you able to verify the source? Were you able to verify that that money came from the safe deposit vault, as you have just testified?

A. No, it is impossible to do that.

Q. Why was it impossible, Mr. Hellman?

A. Because I wasn't at the vault in 1944 to see it or trace the transaction.

Only the person that was there in 1944 could tell if that money came out of the vault.

Q. Were you able to find any records supporting your statement that the money came out of the vault?

A. Just the testimony of Mr. Olender.

Mr. Drewes: May that be stricken as non-responsive, your Honor?

The Court: Yes, that may go out.

Q. (By Mr. Drewes): Will you answer the question? A. Will you repeat the question.

Mr. Drewes: Will you read the question, Mr. Reporter?

(Question read by reporter.) [1005]

A. No.

Q. (By Mr. Drewes): Now how many suits did that represent, Mr. Hellman?

A. 822 suits.

Q. And how do you know that?

A. The suits were \$25 apiece, from mathemati-

(Testimony of Roland Hellman.)

cal computation. Also the checks total up to \$20,550.

Q. How do you know that the suits cost \$25, Mr. Hellman?

A. That is the price that he was—there was a subsequent—that information is based on what Mr. Olender stated he paid for the suits.

Q. Were you able to find an invoice or any other records supporting that testimony?

A. There is no invoice on this item.

Q. Did you find any other records supporting the fact that the price was \$25 per suit?

A. On the Goodman suits?

Q. Yes. A. No.

Q. So the fact that there were 822 suits is an arithmetical result arrived at by you by dividing that particular figure of \$20,550 by 25, is that correct?

A. After determining that the money paid to Goodman totaled \$20,550, and the suits were at \$25, we arrived at 822 suits on a mathematical basis. [1006]

Q. Now, moving down the float check, as it has been called, on the left hand side, there is reflected there the figure of \$7,000.

Upon what is that figure based, Mr. Hellman?

A. The \$7,000 is based upon information in that through Mr. Levy there were \$7,000 proceeds turned over to Saraga to purchase additional merchandise, which also was shown on Mr. Saraga's books as being received, \$7,000. Inasmuch as the

(Testimony of Roland Hellman.)

—Mr. Levy and Mr. Olender stated that Mr. Levy had made these sales, the amount of \$7,000 considered to be for 200 suits.

Q. Does that complete your answer?

A. Yes.

Q. How do you know they are Goodman suits, Mr. Hellman?

A. They are suits that Levy had the funds of \$7,000 for that he was selling Goodman suits.

Q. How do you know they were Goodman suits that were sold? How do you know they weren't some other suits presently held by the defendant?

A. At the time I made up this chart it was Mr. Olender's statement that it was the suits that he had received from Goodman that were sold by Levy and the funds or proceeds which Mr. Levy kept and turned over to Saraga.

Q. Were you able to find any other evidence other than Mr. Olender's statement they were Goodman suits? [1007]

A. Only the inventory, the purchase records which would indicate that he didn't have that many suits from any other source to sell.

Q. The purchase records as of what date, Mr. Hellman?

A. The purchases indicated in Mr. Olender's books of merchandise purchased during 1944 and the first part of 45.

Q. Does the purchase record to which you refer reflect the purchase of these Goodman suits?

(Testimony of Roland Hellman.)

A. No, those are the suits that were not taken on the books.

Q. Then how do you support your conclusion that these are Goodman suits that were sold by Levy?

A. It has been testified to by Mr. Olender, by the Government agent, that they could not find any records other than this one transaction where Mr. Olender had made any purchases, other than this Goodman deal, that was not put on the books.

Mr. Drewes: May that be stricken as non-responsive.

The Court: That may go out.

A. I am trying to——

Q. (By Mr. Drewes): If the Goodman transaction is not reflected in the purchase register of the defendant, Mr. Hellman, how do you know that the suits sold by Mr. Levy were Goodman suits? [1008]

A. Because it was testified to.

Q. Were you able to find any other evidence supporting the fact that those suits were Goodman suits other than the testimony of the defendant?

A. No.

Q. How do you know, Mr. Hellman, that the amount was \$7,000?

A. That is the amount Mr. Saraga received from Mr. Levy for Mr. Olender.

Q. Do you recall Mr. Levy's testimony?

A. I believe I do.

Q. He testified, did he not, that he sold certain suits of a value between 6 and \$7,000 for Mr.

(Testimony of Roland Hellman.)

Olender and took the proceeds to New York, did he not? A. That's right.

Q. Why do you select the sum of \$7,000?

A. Because Mr. Saraga's books indicated that he received \$7,000 from Mr. Levy.

Q. Mr. Levy testified, did he not, that he sold for Mr. Olender 250, 300, or 320 suits, is that correct?

A. He was uncertain as to the exact amount, yes.

Q. Then how do you know that he sold 280 suits?

A. Once again you have a mathematical formula, and also verified by the receipt by Saraga of \$7,000.

Q. You determined the number of suits sold by Mr. Levy by [1009] dividing \$7,000 by \$25, is that correct? A. That's correct.

Q. If in fact Mr. Levy sold suits other than Goodman suits which would have been acquired at a different price, the result would not be the same, would it? A. Would you repeat that.

Mr. Drewes: Mr. Reporter, will you read that back, please?

(Pending question read back by reporter.)

Mr. Lewis: Your Honor, I will object to that question because the only testimony in the record is Levy's testimony and Olender's testimony that they were Goodman suits.

The Court: Overruled.

(Testimony of Roland Hellman.)

Mr. Drewes: Answer the question, Mr. Hellman.

A. On the assumption that there were some suits other than the Goodman suits at a different price, it would effect the computation in this chart naturally.

Q. Now, calling your attention to the right hand side of the chart, Mr. Hellman, the first item appearing thereon, the figure of \$5,000.

Upon what is that item based?

A. That is based on the deposit that was made in the store account on June 19, 1945, and upon the testimony of Mr. Olender and Mr. Levy—principally—and Exhibits in evidence that Mr. Lerman paid through Mr. Levy to Mr. [1010] Olender, \$5,000 for 200 suits at \$25 each.

Q. Now the next item is the sum of \$8,550. What is that figure based upon?

A. That figure is based upon the difference between the known factor—\$5,000 is a known factor, the \$7,000 is a known factor, making \$12,000, the difference being \$8,550.

Q. You arrive at that figure by subtracting the \$7,000 and the \$5,000—the total of \$7,000 and \$5,000 from the beginning figure of \$20,550, is that correct? A. That's correct.

Q. How many suits does that represent, Mr. Hellman?

A. The \$8,550 represents 322 suits—excuse me—342 suits.

Q. Now, is it your testimony that those suits were taken into inventory?

(Testimony of Roland Hellman.)

A. My testimony that they were taken into inventory?

Q. Strike that. Do I understand that those suits were taken into inventory by Mr. Olender in the Army and Navy Store?

A. At what date?

Q. I am asking you, this is your chart.

A. Yes. My understanding of the testimony, based on Mr. Olender's testimony, is that the balance of the suits, of the 342 suits, the remaining balance of 322 suits are taken into inventory as of December 31, 1945. [1011]

Q. Mr. Hellman, how do you know that 322 suits were included in the inventory as of the date mentioned?

A. Through Mr. Olender's testimony.

Q. Were you able to verify that?

A. The inventory sheets show that many suits of that classification on—right on the inventory sheets.

Mr. Drewes: Ask that be stricken as being non-responsive.

Mr. Hagerty: Well, if your Honor please, I think it is responsive.

The Court: I think that that is the witness' answer. That is the answer.

A. Yes, sir.

The Court: That may remain.

Q. (By Mr. Drewes): Were you able to verify the 322 suits were Goodman suits?

A. Through Mr. Olender's testimony, yes.

(Testimony of Roland Hellman.)

Q. You are relying exclusively on Mr. Olender's testimony?

A. He is the only one that has knowledge of these matters.

Mr. Drewes: May that be stricken as non-responsive.

Mr. Hagerty: I think it is cross-examination, your Honor. He is asking for it.

Mr. Drewes: This man is testifying, your Honor——

The Court: That may go out. That may go out.

Q. (By Mr. Drewes): You testified you are a licensed [1012] public accountant, Mr. Hellman?

A. That's right.

Q. You prepared this schedule, did you not?

A. Yes.

Q. I ask if you are able to verify that 322 suits shown in the inventory under December 31, 1945, were in fact Goodman suits?

A. It is impossible to verify that personally.

Q. Were you able to verify it?

A. I answered, did I not, that it was impossible to verify it?

Q. I would like a yes or no answer for the record. A. No.

Q. Now included in the \$8,550 figure there is also 20 suits which were shown here as sold through the store registers.

Were you able to verify those sales?

A. As going through the store registers, no.

(Testimony of Roland Hellman.)

Q. Were you able to verify that those were Goodman suits? A. No.

Q. Were the 342 suits valued at \$8,550 included in the taxpayer's income tax returns, federal or state, as inventory in the years 1944 and 1945?

A. You say 342 suits?

Q. That's correct. [1013]

A. Not on both years' returns.

Q. Mr. Hellman, the sale of 280 suits, allegedly Goodman suits at \$7,000, and the sale of the alleged Lerman suits at \$5,000 were presumably made at cost, is that correct?

A. That is correct, yes, sir.

Q. And the balance of 342 suits were subsequently alleged to have been taken into inventory at cost, is that correct?

A. 322 of the 342 were taken into inventory at cost. No, they were not taken in at cost. They were taken in at cost or market. They were taken in at 50 cents less. \$24.50 as of December 31, 1945.

Q. How do you know that, Mr. Hellman?

A. The inventory sheets show 322 suits at \$24.50, and Mr. Olender testified those were the suits in question.

Q. Do the inventories to which you refer show the figures of \$24.50 as the cost or market?

A. The figure itself as it sits there, it doesn't say that, but there are other suits on the same inventory at \$24.50, and the current purchases around that period indicating that is the current market value, \$24.50.

(Testimony of Roland Hellman.)

Mr. Drewes: I ask that be stricken as a conclusion of the witness.

A. It is not a conclusion.

The Court: The answer may stand.

Q. (By Mr. Drewes): Were you able to verify the cost of the [1014] suits, Mr. Hellman?

A. You are referring to the 322 suits?

Q. Yes.

A. I answered that already, Mr. Drewes. That I couldn't verify the original invoice because there wasn't any.

Q. What about freight, Mr. Hellman, did you take into consideration the cost of freight?

A. There's been no record of any amount paid for freight, whether it was included in the original amount or not is not shown.

Q. Were you able to find any freight bills paid, as reflected in the taxpayer's records, concerning these particular transactions?

A. I didn't search for them. It is possible we might find them in the books.

Q. Did you look for them?

A. I did not look for them, no.

Q. With respect to the 20 suits which were allegedly sold through the cash registers, Mr. Hellman, you treat those on your float chart as having been sold at cost?

A. No, they are merely deducted from the 342. The receipts from those—the proceeds of the sales would be included in along with the regular sales rung up on the register.

(Testimony of Roland Hellman.)

Q. There would then presumably be a profit on the sale [1015] of those 20 suits?

A. Presumably, if he sold them above his cost, which is generally understood he would.

Q. Did you verify or ascertain in any way the price at which those suits were sold?

A. It was impossible to do that. There has been testimony there was no individual record kept of individual sales. We wouldn't have any way of knowing what the exact selling price was of those suits, except through Mr. Olender's testimony.

Q. Did you ask him?

A. Yes, I believe I did. He mentioned somewhere in the \$30—which was material as to what they really sold for on the retail basis. I didn't press it further because it had no value——

Mr. Drewes: I ask that answer, your Honor, as to the materiality or immateriality be stricken.

The Court: Motion is denied. It may remain in the record.

Q. (By Mr. Drewes): Now with respect to the alleged sales of these suits, Mr. Hellman, have you determined what sales were made in 1944 and what sales were made in 1945?

A. Of the Goodman suits?

Q. Yes.

A. Of the original \$20,550 worth? [1016]

Q. Yes.

A. There is no actual determination when the—other than through—I personally could not de-

(Testimony of Roland Hellman.)

termine when they were sold. There has been testimony that 200 suits sold by Levy for \$7,000 was sometime in the spring of 1945. But I could not determine for myself whether they were actually 45 or earlier, sometime in 44.

I said 200 suits. I meant the 280 suits sold by Levy.

The \$5,000 worth of suits, the 200 suits sold through Lerman, was established to have been sold June of 45, based upon the cashier's checks of Mr. Lerman in evidence.

Q. Do you know when the 20 suits which were sold through the register were sold, whether in 44 or 45? A. No, I do not know that.

Q. Now, Mr. Hellman, will you turn to your revised schedule 4, "Disposition of Cash in Safe Deposit Box." Mr. Hellman, you prepared schedule 4 which is before you?

A. With the assistance of Mr. Lieberman, yes.

Q. What was your answer?

A. With the assistance of Mr. Lieberman.

Q. Who is Mr. Lieberman?

A. He is Mr. Lewis' associate.

Q. You assume responsibility for the accuracy of this?

A. Mathematical accuracy and the points—do you mean the [1017] items on here or the mathematical accuracy?

Q. Both. A. Yes.

Q. And is it a complete recapitulation of cash transactions in and out of the vault for the periods shown, Mr. Hellman?

(Testimony of Roland Hellman.)

A. Every transaction we could uncover is, as I stated earlier, is not—cannot be construed as being entirely accurate, inasmuch as we were reconstructing something that happened from 8—6—some eight years ago. We attempted to go through every transaction that was made——

Q. Tell us what you did do?

A. The starting point was the——

Q. I don't want you to go over every item, item by item, Mr. Hellman. Just tell us in a general way.

A. In a general way.

Q. What you did in creating this particular schedule.

A. The starting point was Mr. Ringo's partially completed analysis as per the schedule, Exhibit 45 in evidence now.

We started with Mr. Ringo's partially completed work and finished.

Mr. Drewes: May I ask that "partially" be stricken as being the conclusion of the witness?

A. I don't think it is a conclusion.

The Court: Overruled. Motion is denied.

A. It has been proven that we have definite changes to Mr. [1018] Ringo's statement and therefore it is not complete.

Q. (By Mr. Drewes): His Honor overruled my objection. Continue with your recital of what you did in constructing this schedule, Mr. Hellman?

A. We started with the statement of Ringo and further identified transactions.

(Testimony of Roland Hellman.)

Q. Where did you identify them, where did you go, what did you do?

A. As an example, the transfer—in an analysis—in analyzing the personal bank account it was determined there were certain cash deposits; traced through to the bank, checked the original deposit tickets, and determined that these cash deposits were made. By conferring with Mr. Olender he had made the statement that these had come from cash in the vault. So we put them on the list.

The gifts from the mother were determined from previous—as for Mr. Ringo's statement plus verification, further verification from Mr. Olender, as to the dates or approximate dates.

You know, money going into a vault, one or two days this side or the other side would—you can't state specifically that that is the date that he went in and put it in or took it out, unless you have actually the bank's record of the date of entry into the safe deposit box. [1019]

But the approximate date is shown.

Q. Did you examine the bank's record to determine the dates of entry?

A. No, I didn't. I don't believe they are available.

Q. Go on.

A. The other items were handled in much the same manner. Certain items, it just became evident in the last week or so, such as the Olender-Elkus account, which is one of the reasons we had to revise this just three or four days ago. We

(Testimony of Roland Hellman.)

hadn't uncovered that but it came up—it was discovered, it was included in the net worth statement as presented by the Government. Therefore, we should account for the source of that, and Mr. Olender stated it had come out of the safe box.

Q. Well now, then, Mr. Hellman, calling your attention to the first item, May 5, balance in the safe deposit box \$75,000. Upon what do you base that?

A. That is based upon the testimony of Mr. Olender and the affidavit of Monroe Friedman. They counted over \$70,000 as of May 5. Mr. Olender's statement was it was \$75,000.

Q. The \$75,000 figure is not based on the affidavit of Monroe Friedman as indicated on this schedule.

A. The affidavit says "Over \$70,000."

Q. And the \$75,000 figure was arrived [1020] at—

A. Through Mr. Olender's statement.

Q. Based on Mr. Olender's testimony. Were you able to verify that in any way from any record?

A. There were no records kept of the money in the vault.

Q. Now calling your attention to the next item, which is an addition dated May 5, in the amount of \$7,500. Upon what did you base that?

A. Upon Mr. Olender's statement that was the approximate amount, was between five and \$10,000—this in between figure of \$7,500.

(Testimony of Roland Hellman.)

Q. You just split the difference?

A. Well, you might say split the difference. It was a half figure between the ten and the five. It was—at one time I believe Mr. Olender stated he thought it was close to that figure.

Q. Would it not be conservative accounting practice in preparing a schedule of this kind to adopt the lower of two figures which were possible?

A. Well, in this particular case if we would have adopted that figure as a lesser net worth at the end of 44—by only adding \$5,000 instead of \$75,000 we would have reduced the net worth at the end of each year. Subsequently in 1946 the net worth would be \$2,500 less and we would have \$2,500 less income computed upon the net worth method. So that it's not to the [1021] defendant's—it's to the defendant's disadvantage to have \$7,500 in there.

Mr. Drewes: May that be stricken as not responsive, your Honor?

The Court: Yes, that may go out.

Mr. Drewes: Mr. Hellman, will you answer the question that I propounded to you?

A. Will you repeat the question?

Mr. Drewes: Will you read the question, Mr. Reporter.

(Pending question read by the reporter.)

A. Conservative in which sense, Mr. Drewes?

Q. (By Mr. Drewes): Well you are a licensed public accountant, are you not?

A. That's correct.

(Testimony of Roland Hellman.)

Mr. Haggerty: If your Honor please——

Q. (By Mr. Drewes): Where the——

Mr. Hagerty: I am going to object to this line of questioning. I think it is argumentative. I think the answer that has been stricken was really a proper answer. He is asked as to conservative accounting practices. Conservative accounting practices would understate your position always, costs or marketing, whichever is the lesser income, and if we had adopted the lesser figure that had been stated, we would have shown that his income would not have been understated in that first year. That would [1022] have been conservative.

The Court: You can argue the matter hereafter, Mr. Hagerty.

I think counsel may pursue his examination in his own way. He is entitled to examine this witness on the subject matter of his reports.

If the witness has any explanatory notes to make, it is perfectly all right if he makes them.

But the last answer was not responsive and it was an argument.

A. Your Honor, I believe the term “conservative” is subject matter of interpretation in this matter.

The Court: All right. You might define that as you view it, what you had in mind as a conservative approach, if you wish.

A. From the over-all viewpoint, if you consider conservatism in this particular case, it is to Mr. Olender’s disadvantage. Therefore it would be

(Testimony of Roland Hellman.)

conservative, would it not, to take this in at \$7,500?

Q. (By Mr. Drewes): Is it not true, in examining schedule 4, Mr. Hellman, that if you reduce that figure to \$5,000 you would end up as of December 31, 1946, with a negative figure?

A. I don't believe you made the change on your schedule on this Gray and Magnin items that were taken off the schedule. [1023]

Mr. Drewes: I ask that be stricken. I haven't asked the witness anything, your Honor, about the Gray and Magnin transactions.

A. Mr. Drewes, that is what accounts for the final balance on this sheet. The final balance of cash on hand is not \$385 but \$2,639.76, after the adjustment that was taken out of \$2,254.74.

Q. I beg your pardon, Mr. Hellman, I didn't have that correction. You are absolutely correct. Withdraw my question.

Calling your attention to the next item June 16 transfer to personal account \$100, and the following two items, also in June, the 22 and 27th of \$400, \$1,500. Upon what are they based, Mr. Hellman?

A. I believe my testimony yesterday, when Mr. Lewis was examining me, was that the \$100, \$400 items are in accordance with Exhibit AD and from the testimony of Mr. Olender, and the \$15 item I personally verified at the bank. The bank did not send over the duplicates—the copy of the deposit as they did for the other ones, but I can say that

(Testimony of Roland Hellman.)

I personally verified that at the bank and saw that there was a cash item, and based upon Mr. Olender's testimony that these items would come from cash, it was put on this schedule.

Q. When you said you verified them, what did you verify? [1024]

A. I verified the deposit tickets to ascertain there was a cash deposit of \$1,500 on that day.

Q. Is that true of each of those three items?

A. I did it on all of the items, yes. But on the other ones we can use the Exhibits as prepared by the bank, but this particular one the bank failed to send it over.

Q. You verified the receipt of the money by the taxpayer. You did not verify the source of the money, did you?

A. I verified the receipt by the bank, you mean?

Q. Yes. In each case it is your testimony the bank records show that the taxpayer got those sums, is that correct?

A. That's right.

Q. And they were deposited into his account?

A. That's right.

Q. Were you able to verify the source of those three cash items?

A. Not actually verify. Just through testimony given.

Q. And upon what testimony do you rely?

A. On Mr. Olender's testimony.

Q. And would you please give us that testimony, as you recall it?

(Testimony of Roland Hellman.)

A. I think it is rather lengthy. If you want to give me the transcript I will read it to you.

Q. I prefer you to give it to me just as you recall it? [1025]

A. I don't believe I have—do I have to give—I think it is rather lengthy.

The Court: Give your summary of it, Mr. Witness.

A. The general testimony was that cash other than from bank accounts or business or income as estates, such as dividends or partnership income and rents, was cash taken from the safe deposit box. That was his general testimony. I think it is pretty well outlined in pages 779 and 80 of the transcript, if you care to look.

Q. (By Mr. Drewes): Thank you. Is it not true that this specific item to which we are referring, transfer to personal account in the month of June, are included in schedule four upon the assumption that they must have come from the cash vault because they cannot be shown to come from any other source?

A. That is what Mr. Olender testified, yes.

Q. The Goodman transactions, Mr. Hellman, which you have testified and to which much reference has been made, were not reflected on the books of the taxpayer, were they?

A. On the store books, no. At the initial stage, no.

Q. Is it not possible that receipts of cash as reflected in his accounts could not have come from other unreported sales of merchandise?

(Testimony of Roland Hellman.)

A. When you say it is possible there could have been other sales, do you mean—— [1026]

Q. Other sales similar to the Goodman sale?

A. It is possible in any case for something like that to happen, yes.

Q. Can you state of your own knowledge the three items to which we are referring on schedule 4 did not come from sales of merchandise which are not reported on the books?

A. Not of my own knowledge. Other than, sir, what I have been told or heard in testimony here.

Q. Again referring to the three items, Mr. Hellman, \$100, \$100, and \$1,500, shown as withdrawals from cash in June of 1944. Could those not have been redeposits of cash withdrawn from the bank accounts at an earlier time?

A. When you say redeposits of cash withdrawn from the bank account at an earlier time, redeposits where?

Q. It is my understanding——

A. Oh, I see. You mean instead of going through the safe deposit box, it would be drawn out an earlier date and then put back into the same account?

Q. Exactly. A. It did not occur——

Q. Mr. Hellman, would you please answer my question, then explain if you wish?

A. It is possible.

Q. Now—— A. However—— [1027]

Q. You may explain.

A. For the 1944—the first month prior to this,

(Testimony of Roland Hellman.)

the first six months of the year, there were no withdrawals from the commercial account or the savings account in like amounts which might be construed as being these specific items.

Q. Could the cash not have been withdrawn in an earlier year and subsequently deposited?

A. That's possible, but if you would—it's possible also, as Mr. Olender, testified, he carried fairly large sums of cash in his pocket. I mean, it's hard to actually distinguish between—to exactly say how much of the cash is in the safe deposit [1028] box—and how much he has in his pocket at a specific moment, but I say this you can't—the schedule can't be tied down to the exact date, that this was the specific date that the transaction occurred.

Q. Is it not possible, Mr. Hellman, that those deposits could result from withdrawals from other bank accounts other than the same account?

A. Not the known bank accounts. I believe they are all known at this time. They were checked to see that there were no withdrawals on those specific dates from other savings accounts.

Q. Could they not have been deposits from withdrawals of other accounts at an earlier year?

Mr. Hagerty: If your Honor please, I will object to that question as a hypothetical question not based on the evidence.

The Court: Overruled.

A. Well, if it were a withdrawal from a savings account at an earlier year, and he had the cash in

(Testimony of Roland Hellman.)

his pocket, and then decided to put it in his commercial account, it would have the same—well, actually you would consider that as an additional. I think I am getting my answer mixed up. Would you repeat that question?

The Court: You can strike your answer and rephrase your answer. [1029]

A. I wonder if the Clerk would read the question to me?

The Court: Mr. Reporter, would you read the question?

(Pending question read by reporter.)

A. If we assume that the deposits to his commercial account in these three dates in June had been previously taken from some other bank account and then deposited in at this time prior to—I said that I checked back to the first of '44 and not back beyond that—it's—it could be possible if he were carrying the cash in his pocket for that length of time, yes.

Mr. Drewes: Is it not possible, Mr. Hellman, that the deposits to the personal account to which we are referring, May and June of 1944, may have been funds taken from unreported sales in the Army and Navy Store?

A. Well, income from that source or any source, if you are going to make that assumption, that they are unreported sales——

Q. You made the assumption, Mr. Hellman.

A. What assumption?

(Testimony of Roland Hellman.)

Q. That all of these withdrawals must have come from the cash vault.

A. Yes, based upon what Mr. Olender testified. There has been no testimony there has been any unreported sales other than these specific Goodman items, which were sales [1030] at cost and were not put on the books.

Q. In connection with the answer which you just gave, Mr. Hellman, is it not true that the net worth approach to the measurement of income is used when it is other impossible to determine what the true income of the taxpayer is?

A. When you say "used," you mean used by the Government in determining whether the proper tax liability has been paid?

Q. Or by others.

A. Only in cases after an exhaustive attempt to determine if the books are correct and make adjustments which are made and then it is determined that the books are so far off, in error, or it can be used as a check—generally as a check more than anything else, to determine if the books are correct. If it establishes that the books are entirely wrong, then you would use that method.

Originally it is only a check to see if the books are correct.

Q. I am going to show you Government's Exhibit number 25 for identification and ask you if you have seen this before?

A. Yes, I have seen this.

(Testimony of Roland Hellman.)

Q. The first page reflects that cash in store is reduced between 1941 and '47; you recall examining that item? [1031]

A. Examining to what extent?

Q. Do you recall seeing it before?

A. I saw that on the sheet here, if that is what you mean, yes, as of December 31, 1941.

Q. And what is indicated as the disposition of the \$1,500? A. Which amount?

Q. Look at item number 5.

A. Item number 5.

Q. Refresh your recollection thereby. And you see the explanatory note at the bottom, Mr. Hellman? A. Yes.

Q. What does that indicate?

A. Deposited \$1,500 in personal bank account in 1945.

Q. What treatment, if any, did you accord that particular item in the preparation of schedule 4?

A. I don't know that I particularly treated that item. There is a deposit—if it is the same deposit—we didn't locate any \$1,500 deposits in the personal bank account at 1945, and there is no—I don't have the actual basis for where this statement came from. I thought the records we had were better than this record, so we used the records we had. Let me check again to see that I don't have that on my list of deposits.

The Court: You might make that check during the recess. [1032] The Court intends to take the

(Testimony of Roland Hellman.)

adjournment for the day, ladies and gentlemen. We will resume tomorrow at ten o'clock.

So if you have any checking, in the light of that question, you may do it.

And the same admonition to you, ladies and gentlemen, not to discuss the case under any circumstances or conditions and not to form an opinion until the matter is submitted to you.

(Thereupon an adjournment was taken until Friday October 3, 1952, at 10 o'clock [1032A] a.m.)

October 3rd, 1952—10:00 A.M.

The Clerk: United States of America vs. Olender, on trial.

The Court: You may proceed.

ROLAND HELLMAN

resumed the stand, and having been previously duly sworn, testified further as follows:

Cross-Examination (Resumed)

The Clerk: Mr. Hellman, would you please restate your name for the record?

A. Roland Hellman.

By Mr. Drewes:

Q. The transcript shows, Mr. Hellman, that when we recessed yesterday, I had called your at-

(Testimony of Roland Hellman.)

tention to an item of \$1,500 reflected in the first page of the Government Exhibit No. 25 for identification. I posed this question:

“What treatment, if any, did you accord that particular item in the preparation of Schedule 4?”

Would you answer that question?

A. The deposit—item 5 on Exhibit—do you want me to work from the exhibit? I have a copy of it here. If you want to give me the one in [1033] evidence——

Q. I believe the record shows that this particular——

A. Yesterday when you were questioning me you had given me a copy of the Government exhibit.

Q. I gave you a copy?

A. I was reading from the Government exhibit yesterday. Do you want me to refer to that again?

Q. I gave you that for the purpose of refreshing your recollection, Mr. Hellman. That is not in evidence.

A. All right. That particular item, during our verification of the cash account, was not located as a personal deposit to Mr. Olender's bank account. Therefore indicating an inaccuracy in this statement, and we did not take into our computation because it could not be found as a personal deposit in the year 1945.

Q. Did that \$1,500 go into the vault?

A. There is no record to indicate that it did.

Q. Mr. Hellman, I show you Government Ex-

(Testimony of Roland Hellman.)

hibit No. 15, which is the stipulation made in the record in this trial, and ask you if the \$1,500 item to which you have just referred is not reflected in the very first item?

A. The stipulation indicates a reduction in the cash in the store register from the end of 1944 to the end of 1945 from \$2,500 to \$1,000 or a difference of \$1,500.

Yes, it does.

Q. Didn't you check the various items on that stipulation, [1034] Mr. Hellman?

A. On the cash—yes, we did.

Q. And your testimony is that you found no record of the disposition of that \$1,500?

A. Not during the year 1945, no.

Q. Did you find any record during any of the years?

A. Not specifically identifiable as being that \$1,500.

Q. Why didn't you assume that that went into the vault?

A. It was an item covered by stipulation and it wasn't deemed that it would be taken into account in this consideration here.

Q. The stipulation specifically reserves to the parties the right to introduce evidence concerning the source or disposition of the items shown therein, does it not? . . . A. I believe so.

Q. What effort did you make to determine disposition of that sum?

A. I discussed it with Mr. Olender.

(Testimony of Roland Hellman.)

Q. What did he say?

A. He was uncertain as to whether the reduction was actually in 1945 or 1946. There was also something regarding the theft of some money from the store which was not brought in.

Q. Mr. Hellman, I show you the Government's Exhibits 1 and 2, which are the taxpayer's returns for the years [1035] 1945 and 1946, and I will ask you if they do not reflect the receipt of income from dividends and bond interest in each year; if so, will you state the amount?

A. The year 1945 indicates dividends of \$15 and bond interest of \$575.60.

Q. And for the year 1946?

A. For the year 1946 we have dividends of \$1,572.50 and bond interest of \$1,720.17.

Q. What disposition did the taxpayer make of those sums as reflected by his books of account and records?

A. The taxpayer stated to me that all of those——

Q. Will you please answer the question?

A. You said what disposition did he make.

Q. Yes. As reflected by the books of account and records of the taxpayer.

A. There were no written records other than bank deposits.

Q. And did you find bank deposits which you were able to identify as representing the receipt of bond interest and dividends by the taxpayer in those two years?

(Testimony of Roland Hellman.)

A. I was able to trace specifically but there were deposits in his personal bank account indicating the receipts of amounts in '45 and '46 that could represent either interest or dividends, and inasmuch as I was told by Mr. Olender that he banked all of his bond interest money and the dividends, I did not verify further or attempt to determine [1036] whether that did go into the bank vault or instead of the personal deposits.

Mr. Drewes: I will ask that that part of the answer which refers to what was stated by the taxpayer be stricken as not being——

The Court: It may be the basis upon which you formulated your opinion?

A. Yes, sir, your Honor. When I had made the audit, I had to depend on something. I was at least making inquiries as to what happened and trying to run them down, which certainly wasn't done in the other instance.

Q. (By Mr. Drewes): Apart from what was stated to you by Mr. Olender, were you able to trace the receipt of bond interest and dividends for the years in question into his bank account?

A. There were no—I did verify the original deposit ticket indicated thereon. I did not have the breakdown of the individual amounts of bond interest, bond—bond interest or dividends.

Q. So that it was impossible to specifically identify the receipt of those funds and tie them into the deposit slips, is that correct?

(Testimony of Roland Hellman.)

A. Without having the detail of the exact amount for each time they were received.

Q. It is possible, is it not, Mr. Hellman, that the items [1037] shown on Schedule 4, "Transfers to personal account," might include the receipt of bond interest and dividends?

A. If the checks were cashed that he received in payment of those items, interest of dividends, and he chose to put them in the safe box, they could have gone in there—on that assumption, yes.

Q. You cannot state that various items on Schedule 4 shown as transfers to personal bank account from the vault do not include the receipts by the taxpayer of bond interest and dividends, can you?

A. You mean that they could be included in other amounts—I don't—

Q. Strike the question, Mr. Reporter.

A. I don't—

Q. As I understood your testimony yesterday, those items on Schedule 4, which are indicated as being transfers to the personal account from the vault, the source of which were otherwise unidentifiable—

A. That's right.

Q. —can you state positively that those items indicated on Schedule 4 as transfers to personal account could not include receipts of bond interest and dividends and therefore in effect never came from the vault?

A. The items in Schedule 4 as going—you're talking about—no—Item 4, the withdrawals—do

(Testimony of Roland Hellman.)

you mean [1038] as an addition to the vault or as a withdrawal from the vault?

Q. As a withdrawal.

A. Well, why would he withdraw the money from the vault? We're talking about money received; we are talking about dividends and interest received, and now you're talking about withdrawals from the vault. Why would he withdraw it?

Q. I will ask the question, Mr. Hellman. I will pose it again. As you testified yesterday and have repeated this morning, Schedule 4 contains a number of items shown as transfers from the vault, cash going from the vault into his personal account.

A. That's right.

Q. That is based upon the assumption that the money must have come from that source because it could not otherwise be identified, is that correct?

A. Yes.

Q. You have testified this morning that you could not identify the sums received by the taxpayer by way of interest on bonds and dividends as specific items going into the personal account, is that correct?

A. That's right.

Q. Therefore the question I put to you is this, can you state that the item shown as transfers to the personal account from the vault in Schedule 4 do not include interest [1039] received or dividends received by the taxpayer in the years 1945 and 1946?

A. When you say transfers from the vault—
Mr. Drewes: Your Honor—

(Testimony of Roland Hellman.)

The Court: Yes, I think the question is clear.

Mr. Drewes: Would you read the question again, Mr. Reporter?

The Court: No. You heard the question. Did you hear the question?

A. Yes, I heard the question.

The Court: Well, he can answer it——

A. I can answer the question, your Honor. But not specifically yes or no.

The Court: Well, answer it and make an explanation.

A. If the money had been put in the vault and if you assume the money had gone into the vault, the cash box, and then he made a transfer to the personal account as described on Schedule 4, in that case it could be that those moneys would flow into the cash vault and into the personal account.

Q. (By Mr. Drewes): Mr. Hellman, I did not assume that the money had gone into the vault. My question was whether or not the money could not have gone—money which you have shown on Schedule 4 as coming out of the vault, could not in truth and in fact have included bond interest and [1040] dividends received by the taxpayer?

A. Coming out of the vault?

Q. Not coming out of the vault.

Would you read the question again, Mr. Reporter, the original question?

(Testimony of Roland Hellman.)

(Thereupon the question: "Q. Therefore the question I put to you is this, can you state that the item shown as transfers to the personal account from the vault in Schedule 4 do not include interest received or dividends received by the taxpayer in the years 1945 and 1946," was read by the Reporter.)

A. With reference to the withdrawals indicated on Schedule 4 from the safe deposit box, if proceeds of bond interest or stock dividends had been put into the safe deposit box, then the withdrawals could represent—coming out of the safe deposit box—could be considered as being from that source.

Mr. Drewes: That still is not responsive to my question, Mr. Hellman.

A. I think you better rephrase your question. Maybe I don't understand it.

Q. The items of which there are very many on Schedule 4—

A. Yes.

Q. Which are designated as being transfers of cash from [1041] the vault to the defendant's personal account, are the items which were shown as being deposited in that personal account which you have testified you could not otherwise identify—

A. Yes.

Q. —is that correct? A. Yes.

Q. Secondly, you have testified this morning that you could not positively identify the deposit of bond interest and dividends received by the defendant in

(Testimony of Roland Hellman.)

'45 and '46 as having gone into his personal account, is that correct? A. Yes.

Q. Can you state that the items shown as transfers to the personal account in Schedule 4 do not include bond interest and dividends received by the taxpayer?

A. Schedule 4—I think my answer covers that, because Schedule 4 is a reconstruction of withdrawals from the safe deposit box, and where we show—as an example, on Schedule 4, as an illustration, one of the first—let's take the first item on Schedule 4, "Transfer to personal bank account, \$100." As I understand your question, you are asking me if that \$100 instead of coming out of the safe deposit box and going into the personal bank account could have originated from dividends or interest and gone into the personal bank account?

Q. That's correct. The \$100 as well as the—the \$100, which is the first such item on Schedule 4, transfer to [1042] personal bank account, that represents an unexplained deposit in personal account, does it not? A. That's correct.

Q. Could you state that that is bond interest, as an assumption—we are speaking now of the \$100, as an illustration—and the \$400 or the \$1,500?

A. You could on the assumption, but the reason I didn't assume that was because the majority of the cases the bond interest and dividends—dividends particularly—bond interest, if they are coupons, might be cashed at the bank—it would have—

(Testimony of Roland Hellman.)

they would come from a bank and you would, therefore, have a bank number on it, and where I saw deposits in the personal account indicating bank numbers, I didn't take into any consideration that they would have any effect on the cash in the vault.

Q. If, for example, there was a cash deposit such as that shown on June 17th, the \$1,500 in the personal account——

A. June 17th——

Q. June 17th, the third——

A. On Schedule 4? I see it, the \$1,500. That's a cash deposit——

Q. A cash deposit in the personal account of the taxpayer, is that correct?

A. That is correct.

Q. Do you have any way whatsoever of telling, ascertaining, [1043] determining that that does not include hypothetically \$500 in bond interest received directly by the taxpayer and thus never came out of the vault?

A. No. But there are——The fact that it was actually cash would indicate that it was, as I stated before, that generally you would receive a check. Unless he cashed the check and then converted it into cash and deposited it. If you assume that much, why, it could be possibly, yes.

Q. State if you know how the bond interest is received by the owner thereof on treasury bonds?

A. I believe he has coupons which he clips, cashes. That could be in cash——interest on those bonds could be in cash.

(Testimony of Roland Hellman.)

Q. The coupons are cashed, are they not, in the normal course of events?

A. They can be converted into cash at the bank, yes.

Q. The United States Government pays its dividends on the bonds of the type in question here by cash, isn't that correct?

A. Pays dividends on bonds?

Q. Interest on bonds. I beg your pardon.

A. Pays directly in cash?

Q. They cash—cash is paid for the coupons.

A. You take the coupons, clip the coupons, and take them to the bank and they will give you [1044] cash.

Q. Isn't that the normal procedure?

A. Yes, it is, yes, yes. But there is no bond coupon indicated, any \$1,500 item.

Q. Isn't it possible, Mr. Hellman, that—again this is hypothetical—that the \$1,500 deposit in personal account on June 17, 1944 might include cash received from coupons on Treasury bonds?

A. Yes, it is possible that it could.

Q. Mr. Hellman, you recall testimony in this trial concerning the Riverdale Ranch?

A. Yes, I remember some of it. Most of it, I believe.

Q. Do you recall the testimony to the effect the ranch was sold for \$20,000? A. Yes.

Q. And do you recall the testimony that the taxpayer owned a one-sixth interest in that ranch?

A. Yes.

(Testimony of Roland Hellman.)

Q. Have you determined what disposition was made by the taxpayer of the proceeds from the sale of that ranch? A. Yes.

Q. Will you state what disposition was made?

A. May I have the partnership return?

Q. Yes. I hand you defendant's Exhibit Q. Is that the exhibit to which you refer?

A. This is the California return. I presume it is [1045] identical with the Federal.

Q. That will do.

A. Well, this is the ——. No, I wouldn't have accounted for this, because Mr. Olender's statement to me was that any income or profit derived was received shortly after the close of the year. This is the year 1946 and that would be received in '47 and therefore not pertinent to the case at hand.

Q. In any event, Mr. Hellman, I ask you to state, if you could, what disposition the taxpayer made of his share of the proceeds?

A. I didn't inquire as to what he did in '47.

Q. The record shows, I believe, Mr. Hellman, that the property was sold early in the year 1946.

A. Therefore I should have treated it in the '46 cash analysis?

Q. Mr. Hellman, I am simply asking you if you determined what disposition the taxpayer made of those proceeds.

A. They were assumed to have been—came through in '47 and I didn't go any further than that.

(Testimony of Roland Hellman.)

Q. I am going to show you a document, Mr. Hellman, which is entitled "Escrow statement of Mollie Olender, et al, in account with Home Title Company." It is dated January 29, 1946. I ask you if you have seen that document?

A. I have not previously seen the [1046] document.

Q. What was your answer? A. No.

Q. You have not previously seen it. Did you have any conversation with Mr. Olender concerning the sale of that property?

A. No, I didn't. This apparently didn't appear to be in issue at the time and my work on this case was principally involved in items primarily outside of the stipulation and in items that were in apparent dispute and we didn't go into that phase of it. Any work that I did. I did not make a complete audit of the whole years, of all the years.

Q. Do you recall, Mr. Hellman, testimony that you gave earlier in the trial concerning possible amount of capital gain and tax thereon on the sale of the Riverdale Ranch?

A. That was yesterday. I told Mr. Shelton I made an error in the computation, that I recomputed it.

Q. Do you remember my showing you Government Exhibit No. 2, which is the taxpayer's return for '46, and calling your attention to the Wilson Avenue property sale in the same year?

A. Yes.

Q. Following your testimony with respect to

(Testimony of Roland Hellman.)

those transactions did you make an examination of the taxpayer's books to determine the disposition of the proceeds from the sale of one of those properties? [1047]

A. That is not taken into account on my Schedule 4, no.

Q. You know as a fact, do you not, Mr. Hellman, that the defendant received in excess of \$3,000 as his share of the proceeds of the sale of that Riverdale Ranch in 1946?

A. I do not know that he received it in cash, but that he was entitled to that amount based on the reported sale. Whether it was actually distributed by the partnership, I have no direct knowledge.

Q. And you made no effort to determine whether he had received anything from the sale of that property, the disposition thereof?

A. The answer is the same on the partnership transaction, that it was not traced down to determine when he received that cash. Assuming that it came in '47, inasmuch as he stated he received his partnership income the following year, I didn't attempt to locate what happened to the income that was reported on the '46 return.

Q. We are dealing here not with proceeds in the form of income—

A. That's right—excuse me.

Q. —but the inclusion of the sale of the property.

(Testimony of Roland Hellman.)

A. The Wilson Avenue property, that's right. No, no, that was not determined where the proceeds from that sale went, whether they went into the bank or cash. Wait a minute. Yes, I was—the Wilson Avenue property is taken into [1048] account here. We have a deposit in Mr. Olender's personal bank account, May 29, 1946, of \$2,659.66, which is the remainder of the total amount received of \$5,659.66, which Mr. Olender testified was the total amount received, and \$3,000 of that went into his wife's account. We have taken that into consideration in our——

Q. What was the source of those particular receipts?

A. The bank deposit ticket of May 29, 1946, indicated a deposit of \$2,659.66.

Q. To what were you able to trace that, Mr. Hellman?

A. That plus the \$3,000 deposit in his wife's savings account on the same date there above, and the information that that was the sale price reported on the tax return—that is the amount that he received.

Q. From what, Mr. Hellman?

A. From the sale of the Wilson Avenue property.

Q. What about the sale of the Riverdale Ranch?

A. That was through the partnership and, as explained before, that was not taken into account in '46.

(Testimony of Roland Hellman.)

Q. Then your schedules 3, 4 and 3-A are inaccurate to the extent that they do not account for the receipt of the taxpayer's interest from the sale of the Riverdale Ranch; is that correct?

A. I don't believe the other computations take that into account either, Mr. Drewes. But to that extent, yes, it is. [1049]

Q. In the interests of time, Mr. Hellman,—. You have your Schedule 4 in front of you?

A. Yes. I have, yes.

Q. I have asked you a number of questions. You have answered them, with respect to the withdrawals of \$100, \$400, and \$1,500, on June 16, 22, and 27, respectively.

Now if I asked you the same questions with respect to the following withdrawals, would your answers be the same?

July 17, transfer to Olender-Elkus account, \$1,500.

August 24, transfer to personal bank account, \$300.

June 9, 1945, transfer to personal account, \$500.

August 27, transfer to personal account, \$522.

November 20, transfer to personal account, \$10,000.

May 1, 1946, transfer to personal account, \$6,000.

May 2nd, transfer to Olender-Elkus bank account, \$1,700.

July 20, transfer to personal bank account, \$570.38.

(Testimony of Roland Hellman.)

September 28, transfer to Olender-Elkus bank account, \$2,500.

September 23, transfer to personal bank account, \$1,500.

November 25, transfer to personal bank account, \$6,000.

December 4, transfer to personal bank account, \$2,800.

December 20, transfer to personal bank account, \$1,500.

A. No.

Q. State in what respect it would not?

A. Because it could not be that many items coming from [1050] the source that you indicated going into the personal bank account.

Q. Would you explain that, Mr. Hellman? I don't understand you.

A. You asked me the question if my answer would be the same as to the question on the first three items on there, if it would be the same in regard to all of these, and I say, no, because there could not be that much money on these large amounts. Some of these smaller amounts, it might represent interest or dividend payments. But you very seldom have a payment over two or three hundred dollars, and you certainly could not include these large items here as dividends or interest. In part—if there was two or three hundred dollars as part of the \$1,500 item, yes, but not the entire items, no.

(Testimony of Roland Hellman.)

Q. Well, the small items of dividend and interest—they are relatively small—they could be included in the larger items.

A. Yes, but these items that we are talking about here—

Q. Then with that qualification, would your answer be the same?

A. That there could be those minor amounts included in those items that we show as transfer from the safety box, could in effect have been receipts from dividends or interest. [1051]

Q. To be sure we understand each other, with the qualification which you have made, would the questions which I propounded to you and the answers which you gave in connection with the first three items, June 16, 22, and 27, be the same with respect to the other such transfers that I have read into the record?

A. In any amounts that may be deemed to be interest or dividends, they could be included in there, yes.

Q. It is important, Mr. Hellman, that—strike that. I am trying simply to save time here, and it is important that the record that is being taken down reflects precisely what we are doing here. I want to be sure there is no misunderstanding. I asked you if with the exception of the qualification as to the interest, dividends going into these larger amounts which you have explained, would your answers to the questions that I propounded to you

(Testimony of Roland Hellman.)

in connection with those first three items already indicated in the record be the same with respect—

A. I gave the answer previously. That will save some time.

Q. Is your answer “Yes”—with that qualification?

A. Only with the qualification. I will not say “yes” alone. Your question has too many intricacies in it. There are too many assumptions, and so forth, to answer that yes or no. [1052]

Q. Is your answer “Yes” with the qualifications which you put yourself in the record?

A. As I put myself in the record, the answer could be “yes.”

Q. Mr. Hellman, again in the interests of precision here, one of my associates has just indicated that you may have misunderstood my questions that I have just asked of you. I am not referring only to the matter of interest and dividends. My question was with respect to all of the questions which I have asked you concerning the first three transfers to personal bank account, if I asked you the same questions with respect to the other transfers that I have indicated would your answers be the same, with the qualification, any qualification that you have made?

A. I would want a specific question on each item. I cannot answer that.

Mr. Drewes: Would your Honor indulge me just a moment? I am trying to work out a way of

(Testimony of Roland Hellman.)

speeding this up so that I won't have to go through this extensive questioning into each one of the similar items.

The Court: Take the morning recess. That will give you a chance to collate your material.

Same admonition, ladies and gentlemen.

(Short recess.)

The Witness: Mr. Drewes, I refreshed my memory on one [1053] of the questions you asked me that I couldn't answer. I have some documentary evidence in respect to the answer. May I give it to you at this time? The question regarding the disposition of the proceeds from the Riverdale sale in Fresno in January, on which you showed me the escrow statement—

Q. Yes.

A. I might further explain that, as I stated I believe yesterday, that in working on this I worked with Mr. Lieberman, who had previously worked on it, and certain items that were already satisfactorily explained were not gone into by me. Therefore, certain of these items, if my memory isn't too good on them, is because I didn't actually go into them, considering that they had already been satisfactorily accounted for, and of which this is one of the items.

In the journal entry of Mr. Olender, on his books, of the Army & Navy Store, under date of April 2, 1946, is an item, "Debiting loans payable, reducing loans payable, and crediting M. Olender's

(Testimony of Roland Hellman.)

capital account in the amount of \$3,000." The explanation: "From cash received from Riverdale Ranch sale. M. O. Personal."

Now the loan payable reduced was that of his mother Mollie Olender, and Mr. Olender had told Mr. Lieberman that there was a letter from his mother referring to her keeping [1054] the money and it would apply against the amount that Mr. Olender owed his mother. Therefore that money never did come in in the form of cash.

Q. How much did he receive, do you recall?

A. He did not actually receive any cash. He just reduced, made an entry on his books reducing the amount he owed his mother by \$3,000.

Q. What was his share of the proceeds from the sale of the Riverdale Ranch?

A. I believe the escrow statement you showed me indicates it was thirty-three hundred something.

Q. \$3,319.29? A. That's correct.

Q. What disposition was made of the difference?

A. Apparently none. It was just that it was a personal matter between his mother and he, and he credited the loan by \$3,000. Actually he gave her \$3,300.

Mr. Drewes: May I ask that be stricken? I will withdraw the motion.

Q. Upon what evidence do you base your statement that he gave her \$3,319?

A. Upon the statement by Mr. Olender.

Q. In this trial?

(Testimony of Roland Hellman.)

A. I don't believe he made it in this trial. But I am explaining why this item was—did not appear on my Schedule [1055] 4. Because it was explained to me, and it appeared a very satisfactory explanation in the light of this type of a computation, and we accepted it.

Mr. Drewes: May I ask that the witness' answer be stricken as unsupported by the testimony in the trial?

The Court: The motion is denied.

Q. (By Mr. Drewes): To the extent that Schedule 4 does not reflect—Schedule 3 and 3-A and 4 do not reflect the disposition of the \$3,319.29, the schedule is incorrect, is that correct? A. No.

Q. Does not Schedule 4 purport to be a complete statement of all assets and disbursements of cash? A. No.

Q. To what extent is it not complete?

A. I explained previously that Schedule 4——. To begin with, this specific item—I just finished saying that he never actually received any cash; it never went through his cash—Schedule 4—never went through his account, cash account. I explained yesterday that Schedule 4 was an attempt by us to reconstruct in some detail, far greater than Mr. Ringo did, to arrive at a possible balance of cash on hand. The original figures were so inaccurate that we determined it was necessary to attempt to reconstruct the cash balance, and we have gone to certain exhaustive [1056] lengths to

(Testimony of Roland Hellman.)

run these items down and come up with a certain balance.

We might not have gotten every item. We do not know that we do perfect work and can find everything. During the trial we saw last week, we found three or four items, and we had to revise Schedule 4 because items came up that we had no previous knowledge of or we did not run into it.

Q. You testified that you knew of this item, the receipt of the Riverdale property—

A. Yes, sir.

Q. —and that you discussed it with Mr. Olander and he told you that the money had been turned over to his mother, is that correct?

A. At the time I was making my analysis of the cash with Mr. Lieberman. He had already had an explanation on that item and it was in the books. We therefore did not pursue it at that time any further.

Q. Mr. Hellman, wouldn't sound accounting practice require that you account for the receipt of a disbursement if you knew of it, even though under your interpretation it would result in a wash entry, so to speak?

A. We are not making a detailed audit here, Mr. Drewes. Sound accounting practice would also require the Government agent examine those figures. They never took those into consideration.

Q. How do you know that?

A. Because they accepted the figures on Ringo's

(Testimony of Roland Hellman.)

sheet and they were not taken into consideration. They merely took some round figures that were put on a question and answer sheet at the end of the year and determined those to be the cash on hand. That's not a comprehensive audit.

Q. You have testified that there is an entry in the books of the taxpayer reflecting the debit to loans payable and credit to capital account in the amount of \$3,000 with the explanation that referred to liquidation of part of a loan from the taxpayer's mother, is that correct? A. Yes.

Q. Who located that entry in the book?

A. You mean during the recess?

Q. Yes. Who pointed it out to you?

A. Mr. Lieberman and Mr. Olender together.

Q. Mr. Hellman, you will recall that in connection with three items on Schedule 4 shown as withdrawals in the amount of \$100, \$400 and \$1,500 on June 16, June 22nd and June 27th, respectively, I asked you if it were not possible that those receipts as reflected by the personal ledger account of the taxpayer could not have come from this unreported sales outside of the business as was the Goodman sale. I also asked you if it was not possible that those receipts could have come from unreported withdrawals of cash from the [1058] business. I asked you if those receipts could not have been redeposits of sums which were withdrawn from that or other bank accounts at an earlier date. I asked you if they could not have been derived from dividends and interest received by the tax-

(Testimony of Roland Hellman.)

payer. And I asked you if they could not have been received as a result of sale by the taxpayer of other assets.

You replied that they could.

A. To all of those things with the assumption that if there were such things. Based upon the documentary evidence or any evidence in this case, you can't make—you would have to be making an awful broad assumption that they would come from that source.

Q. In each case I asked you if it was not possible, they being unidentified receipts by your own testimony.

Mr. Lewis: Your Honor, I am going to object to one part of his question, and that is "unreported sales" because when I asked Mr. Whiteside, the only transaction he said that he could find was the Goodman transaction, and he found no evidence of any other.

The Court: The objection is overruled, Mr. Lewis. This question is——

Mr. Lewis: It is hypothetical.

The Court: It is purely hypothetical, and I think the jury understands that that is based upon hypothesis and it [1059] may or may not be that any of the supporting data or supporting income may or may not be present in the records. It is purely a hypothetical question. The jury understands that. The Court likewise understands it.

Q. (By Mr. Drewes): You testified that that was so, it was possible. Now, on Schedule 4 there

(Testimony of Roland Hellman.)

are a number of other similar items, on other dates, showing transfers from the vault to the personal account. They are as follows:

August 24, 1944, \$300.

June 9, 1945, \$500.

August 27, 1945, \$522.

May 1, 1946, \$6,000.

July 10, 1946, \$570.38.

September 23, 1946, \$1500.

November 25, 1946, \$600.

December 4, 1946, \$2800.

December 20, 1946, \$1500.

Now, if I asked you the same questions with respect to those items, would your answers be the same?

A. Upon the assumption that there was such unreported transactions, or from those sources it could be that those items going into the personal bank account would have stemmed from that source rather than out of the vault.

Q. Now, keeping in mind, Mr. Hellman, the questions which were asked of you and which I have just repeated, I call your [1060] attention to Schedule 4, particularly with respect to item shown on July 17th, "Transfer to Olender-Elkus account," in the amount of \$1500; the item on May 2, 1946, "Transfer to Olender-Elkus account" in the amount of \$1700; and the item of September 18, 1946, in the amount of \$2500, "Transfer to Olender-Elkus account."

(Testimony of Roland Hellman.)

If I asked you the same questions with respect to those items would your answers be the same?

A. As to if they came from some other source?

Q. If it is possible they could have come from the sources enumerated?

A. Disregarding the evidence in this case and making those assumptions, it could, yes.

Mr. Drewes: May I ask your Honor that the witness' statement, "disregarding the testimony in the case," be stricken?

The Court: Yes, that may go out. It is a hypothetical question. I think the witness understands it.

Q. (By Mr. Drewes): And finally with respect to the item appearing on Schedule 4 under the date of May 1st, "Transfer to Olender-McGrete bank account" in the amount of \$5,000, if I asked you the same questions with respect to that transfer, would your answers be the same, Mr. Hellman?

A. On that assumption, yes.

Q. Mr. Hellman, do you have Exhibit 25 for identification? [1061]

A. No, I don't have.

Mr. Hagerty: Here it is.

Mr. Drewes: Thank you, M. Hagerty.

Q. Mr. Hellman, referring to Schedule 4, I call your attention particularly to three additions:

July 5, 1944, "Gift from mother Mollie Olender," in the amount of \$2500.

December 15, "Gift from mother Mollie Olender," \$1000.

(Testimony of Roland Hellman.)

January 2nd, 1945, "Gift from mother Mollie Olender," \$3,000.

Upon what evidence in the case do you base those particular additions to cash?

A. On the testimony of Mr. Olender.

Q. And upon any other source?

A. Reference was, I believe, made to Exhibit 7, Schedule A, of Exhibit 25 marked for identification.

Q. I show you Exhibit 25 for identification, particular reference to Exhibit 7, Schedule A, entitled "Withdrawals from savings account in Fresno," and listing six dates and corresponding amounts, and ask you if you relied upon that schedule?

A. No, we did not rely upon this schedule entirely. Although it was the original source indicating that a gift was made.

Q. Did you verify those transactions, Mr. Hellman? [1062]

A. The withdrawals from the savings account in Fresno?

Q. Yes.

A. Only to the extent of looking at the withdrawals from the pass book of his mother and therein indicating that withdrawals had been made, and Mr. Olender's statements to Mr. Lieberman and myself that at the time he withdrew from the bank in Fresno—at the time his mother withdrew from the bank in Fresno to make gifts to his sister, that he also received gifts on or about the same date in the form of cash or cashier's checks.

(Testimony of Roland Hellman.)

Inasmuch as the sister's account was at the Fresno Bank, a transfer was made into her account. But there was no transfer made to his savings account, that that came up to him in Oakland.

Q. Did you verify the transactions on the books of the banks in Fresno?

A. Do you mean to go there or check with them to see about these withdrawals?

Q. That's right.

A. No. We just had the passbook and the statements of Mr. Olender and—Mr. Lieberman and myself.

Q. Did you testify that you examined the passbook? A. Of Mrs. Olender?

Q. Yes. A. The savings passbook?

Q. Yes. [1063] A. Yes.

Q. Where did you get that?

A. From Mr. Olender.

Q. Did he have it in his possession?

A. Yes, sir, he did.

Q. And are there withdrawals reflected in the passbook in the amounts and dates as testified by Mr. Olender?

A. Do you mean as testified in court here as to the dates of withdrawals?

Q. Yes.

A. There are corresponding amounts of withdrawals.

Q. Did you check to see whether there were withdrawals on the passbook of Mollie Olender

(Testimony of Roland Hellman.)

corresponding to the dates and amounts shown on Exhibit 7—— A. Schedule A——

Q. Schedule 7 of Government Exhibit 25 for identification.

A. Only the four—the three on the last part of the schedule. The ones prior to May 4, 1944, which was the date we started to trace the cash from, we did not consider the prior three withdrawals—only the ones after July 5, 1944, and December 15 and January 2 of 1945.

Q. I am going to show you now the Government's Exhibit No. 52, consisting of copies of the bank records of the Bank of America at Fresno which were introduced into evidence yesterday, and ask you if you have examined them? [1064]

A. When the originals were presented in evidence yesterday I was sitting at the table and I glanced through them but I didn't examine every one of them, no.

Q. Have you examined them since that time?

A. Not in detail, no.

Q. Calling your attention to the item December 15, "Gift from mother Mollie Olender, \$1000"——

A. Are you referring to Schedule 4 now?

Q. I am referring to Schedule 4. A. Yes.

Q. What disposition of that \$1000 was indicated by the records of the Bank of America?

A. I don't see any relation other than——

Q. Mr. Hellman, didn't you examine the records, the exhibit which is in front of you, in great detail after it was put in evidence? A. This?

(Testimony of Roland Hellman.)

Q. The records of the Bank of America.

A. These here?

Q. That are in front of you, yes.

A. Yes. No, I examined them yesterday when they were put in evidence.

Q. Yes. A. During the recess, yes.

Q. And did you examine them very carefully to see whether [1065] or not the alleged gifts of the taxpayer were or were not supported by those bank records which are in front of you?

A. Supported to what extent?

Q. I will rephrase the question. After that exhibit was put into evidence, the bank records of the Bank of America in Fresno pertaining to the Olender accounts there, did you not examine them very carefully to determine whether or not the defendant's contention that he received gifts from his mother, a gift from his mother on December 15, 1944, was or was not substantiated by the transactions as reflected in those records?

A. Well, there's a lot of records here. Specifically what records?

Q. Did you examine those records to determine whether or not there was a withdrawal from Mollie Olender's account in the amount of \$1000 on December 15?

A. I checked that and, of course, that was in agreement with the passbook that Mr. Olender already had.

Q. And there was——

A. I had known that already.

(Testimony of Roland Hellman.)

Q. There was such a withdrawal?

A. Yes, \$1000.

Q. And then did you check those records to find out what happened to that \$1000?

A. (No response.) [1066]

Q. Mr. Hellman, you heard Mr. McNab testify the \$1000 withdrawn on December 15 was deposited in Mrs. Olender's commercial account on the same date supported by withdrawal slip and deposit slip, and that thereafter the money was not withdrawn; did you hear that testimony?

A. I did. I believe so, yes.

Q. Did you check those records to see whether that was accurate or not?

A. I don't recall checking for that specific purpose.

Q. You heard Mr. McNab testify that on January 2, 1945, there was a withdrawal from Mollie Olender's account in the amount of \$3,000; that on the same date \$3,000 was deposited in Terrys Olender's savings account; and that thereafter no withdrawals were made from that account; you remember that testimony?

A. I heard that testimony. Whether that is the exact wording—I presume you are reading from the record.

Q. Did you examine the records which are in front of you to determine whether or not the records so reflect?

A. Not after his testimony, no.

Q. I will hand you the Government's Exhibit

(Testimony of Roland Hellman.)

No. 53, Mr. Hellman, which was put into evidence yesterday and identified as the records of the Security First National Bank, Fresno. I will ask you if you heard the witness testify that on July 5, 1944, the records reflect a withdrawal from [1067] Mollie Olender's savings account in the amount of \$2500 but that the disposition thereof could not be determined because the withdrawal slips could not be located; did you hear that testimony?

A. Yes, I recall that.

Q. Did you check those records to see whether or not that was the case?

A. Check these records?

Q. Yes. A. No, I didn't even see these.

Q. To the extent that those records support—strike that. Assuming that those records reflect the transactions as I have related them to you, would you change Schedule 4 by deleting the three items "Gifts from mother" which I have referred to?

A. My answer previously to you was that I was not considering these as the source of the gifts, the money coming out of Mrs. Olender's bank accounts.

Q. The source of the gifts was Mr. Olender's testimony, that that is where he got it, is that correct?

A. Not entirely. Mr. Olender's statement was that he got them from his mother.

Q. That is right. A. That's right.

Q. Yes? A. That's right, yes. [1068]

Q. And he testified that he got them out of her

(Testimony of Roland Hellman.)

—he got the money out of her accounts in Fresno on the dates and in the amounts shown on Government's No. 25 for identification, is that correct?

A. I do not know. I would have to see the transcript to tell you for sure if he said that.

Q. Weren't you in court, Mr. Hellman, when I showed No. 25 for identification to Mr. Olender and asked him as to each withdrawal, whether on that date he received the sum shown from his mother as a gift which she had gotten from her accounts in Fresno; do you remember that testimony?

A. I can't remember the specific testimony, no.

Q. For purposes of refreshing your recollection, Mr. Hellman, I want to read from the transcript the testimony in this trial, beginning at page 456.

Mr. Hagerty: What volume is that?

Mr. Drewes: Page 456, in Volume 7. Beginning at line 6 on that page:

“Q. I show you, Mr. Olender, Government's Exhibit No. 24 for identification, particularly with respect to Exhibit 7, Schedule A.”

I take it that is an error. It is No. 25 for identification.

“You testified this morning, Mr. Olender, that that schedule represents gifts from your mother to yourself, is that correct? [1069] A. Yes, sir.

“Q. And I note that the schedule is entitled ‘Withdrawals from savings accounts in Fresno.’

“What is meant by that, Mr. Olender?

“A. That is where the funds came from.

“Q. From what savings accounts in Fresno?

(Testimony of Roland Hellman.)

“A. She had two savings accounts in Fresno.

“Q. Where were they?

“A. One in the Bank of America, one in the Security First National Bank.

“Q. And where, for example, in the first item where the date is shown as February 3, 1942, and the amount of \$1,000, does that mean that there was a withdrawal from one or the other of those two banks on that date? A. Yes.

“Q. And in that amount? A. Yes.

“Q. And on March 31, 1943, your mother withdrew \$1,000 as a gift to you? A. Yes.

“Q. And withdrew it from one or the other of those two banks? A. Yes.

“Q. Similarly on January 6, 1944, she withdrew \$2,000 from one or the other of those two [1070] accounts and gave it to you? A. Yes, sir.

“Q. What disposition did you make of those funds, if you recall?

“A. Some of it I put in my safe deposit box, some I used in other ways.

“Q. Well now, you state that you put it in your safe deposit vault. In what form?

“A. Currency.

“Q. She made the withdrawal and gave it to you in currency? A. Yes.

“Q. On July 5, 1944, did she withdraw \$2500 from either one of those two accounts and give it to you? A. It says so in there.

“Q. Was that true? A. Yes.

(Testimony of Roland Hellman.)

“Q. And on December 5, 1944, she withdrew \$1000?
A. December 15.

“Q. I beg your pardon, you are correct.

“A. Yes.

“Q. And on January 2, 1945, she withdrew \$3,000 from either one of those two accounts and gave it to you in currency? [1071]

“A. Yes, sir.

“Q. And you put it in your safe deposit vault or made some——

“A. I don't know where I put it. I put it somewhere.”

Do you recall that testimony, Mr. Hellman?

A. What is the date on that?

Mr. Hagerty: If your Honor please, in addition to that, the testimony on page 459, the answer to the question should be added to that, the beginning of line 4. The question, well, it really begins on the bottom of page——

Mr. Drewes: Well then, let me read the rest of it. I will continue it from that point.

Mr. Hagerty: All right.

Mr. Drewes: The last answer:

“A. I don't know where I put it. I put it somewhere.

“Q. Other than your safe deposit vault where would you have put it?

“A. I might have deposited it in one of my accounts, I am not sure.

“Q. Would your bank records show deposits of those sums as of any of those dates?

(Testimony of Roland Hellman.)

“A. They may or may not, I don’t know.

“Q. You could examine your records for us, couldn’t you, and let us know?

“A. Yes, I could. I haven’t. [1072]

“Q. But there is no question in your mind with respect to Exhibit 7 which is in front of you as to each one of those amounts your mother withdrew that sum from either one of the two banks which you have designated on the dates shown and gave the money to you in cash?

“A. I am not positive that the money came out of those banks was given to me. She may have taken money those same dates from some other place, but she definitely withdrew that amount of money on those dates either from the bank or some other bank and gave the money to me. But there are positive withdrawals on that date, and I checked with my mother to make sure they are correct.

“Q. There are positive withdrawals on each one of those dates? A. Yes.

“Q. And the money was given to you?

“A. Yes.

Mr. Hagerty: That is as far as I meant. In other words, that answer on line 4.

Q. (By Mr. Drewes): Mr. Hellman, do you recall that testimony?

A. I don’t know if I was in Court that day. What is the date of that testimony? I read the transcript but I might not have gathered all that from reading it hurriedly. [1073]

Q. Tuesday, September 23.

(Testimony of Roland Hellman.)

A. No, I wasn't in Court that day.

Q. It was the afternoon session. You were not in Court? A. I don't believe I was.

Q. Did you read the transcript?

A. Yes, I read the transcript.

Q. You also heard the testimony of the bankers with respect to the disposition of those funds as reflected by the records which are in front of you, have you not?

A. Showing the withdrawals and the deposits in her account?

Q. Yes. A. Yes.

Q. In the light of that testimony do you wish to change Schedule 4 to delete those gifts as having been received by the taxpayer? A. No.

Q. Why not?

A. I think my original answer to your question covered that.

Q. I don't recall it, Mr. Hellman. What was it?

A. To rephrase it, the dates indicated in Schedule 7 of the gifts from Mrs. J. Olender, mother, as I said in our preparation of Schedule 4, Mr. Olender was uncertain as to whether these were moneys coming out of the bank accounts [1074] or whether—just where the source, other than it came from the mother, was. But he said that always when his mother made a gift to him she made a gift to his sister at the same time. We did not attempt at that time to ascertain whether the withdrawals went into his sister's bank account or whether they came to him. But inasmuch as his statement was to that

(Testimony of Roland Hellman.)

effect, that his mother always made the gifts identical, generally speaking, he said, why, we took those dates as being the approximate time that he would have received money from his mother.

Q. When did he tell you that, Mr. Hellman?

A. Oh, I can't be certain of the time he told us. We were—during one of the conferences we had in preparation of this schedule.

Q. When did Mr. Olender first tell you that his mother had made duplicate gifts to his sister?

A. I don't remember the exact time, but he was going through—he has a big, a book showing some transactions of his mother, showing—and showing the gift, gifts made, being gifts to his sister and gifts to himself.

Q. In truth and in fact, Mr. Hellman, did not Mr. Olender first tell you that his mother made duplicate gifts to his sister at approximately the same time gifts were made to him yesterday afternoon after the witness from the bank testified that the withdrawal of \$3,000 on January 2nd, 1945, [1075] went into the account of Terrys Olender Gambor?

A. No.

Q. When did he tell you?

A. I can't remember the specific date. It was during our conferences. We have been working the last three weeks on this case.

Q. Did the taxpayer tell you—strike that. The Bank of America records, at the Fresno Branch, which you have in front of you, reflect a transfer of

(Testimony of Roland Hellman.)

\$3,000 January 2nd from the savings account of Mollie Olender into the savings account of Terrys Olender Gambor. Do they reflect a similar withdrawal in a similar amount on that date?

A. January 2nd of what year?

Q. In other words, are there two \$3,000 withdrawals?

Mr. Hagerty: I will object to that, your Honor. The exhibit is the best evidence of what it demonstrates, what it portrays. The record itself has been covered in this matter thoroughly all the way. It is obvious there is no other withdrawal in that particular account. It was so testified by the men who brought in the accounts, that they didn't know what other affairs she had or went on with—what other cash transactions. I think the matter has been fully rehashed already, your Honor.

Mr. Drewes: We are just starting, Mr. Hagerty. I believe, your Honor, that the jury is entitled to know what [1076] the records reflect.

A. Can I have—can you refer me to the account number so I will know which of the records to look at?

Mr. Drewes: Account No. 3941, as I recall it, is the savings account of Mollie Olender.

A. And the date of withdrawal was—which date?

Q. January 2nd, 1945. A. \$3,000.

Q. Is there another \$3,000 withdrawal on the same date? A. On the same date?

Q. On that date. A. No. No.

(Testimony of Roland Hellman.)

Q. Is there a \$3,000 withdrawal on any date approximate thereto? A. In this account?

Q. Yes.

A. No. The next item of transaction occurred in May of a \$1000.

Q. Does the record which you have in front of you, account No. 3941, reflect a withdrawal of a thousand dollars on December 15, 1944?

A. Yes.

Q. Is it one or are there more than one \$1000 withdrawals? A. On December 15?

Q. Yes. [1077]

A. No, only one withdrawal of \$1000.

Q. Now will you examine the records and tell me if that \$1000 did not go into the commercial account of Mollie Olender?

A. (Witness examines records.)

Mr. Hagerty: If your Honor please, on direct examination of the defendant, there was offered the lease for the year 1951. We now have certain checks covering the period that is actually in question and the lease of that time, which I will proffer into evidence after Government counsel has had a chance to examine it.

The Court: All right.

A. I find the deposits to her personal account of a thousand dollars but I don't see——

Mr. Drewes: If your Honor please, it is five minutes to 12. I intend to question the witness as to several other similar items. Possibly if he were to examine the records thoroughly over the recess——

(Testimony of Roland Hellman.)

The Court: I suggest we resume at 2:30. In the meantime if counsel on both sides will collect the material as far as you are able, it might expedite the examination, and you have the lease now presented by counsel.

Mr. Drewes: Yes.

The Court: The lease with respect to the prior years. The last lease he presented was the 1951 lease. This refers [1078] to prior years. So that we may hasten the examination as much as possible.

We will resume at 2:30, ladies and gentlemen, with the same admonition to you.

(Thereupon an adjournment was taken until 2:30 o'clock p.m. this date.) [1079]

October 3rd, 1952, 2:30 P. M.

ROLAND HELLMAN

resumed the stand, and having been previously duly sworn, testified further as follows:

Cross-Examination

(Resumed)

By Mr. Drewes:

Q. Mr. Hellman, do the records before you show that the thousand dollars was deposited in Mrs. Olender's commercial account?

A. February 3, 1942, item of \$1000.

Q. No, December 15, 1944. I am still referring to Schedule 4.

A. Schedule 4——

Q. Schedule 4.

(Testimony of Roland Hellman.)

A. On Schedule 4, December 15, 1944, \$1000—yes.

Q. Gift from mother?

A. That's right, yes.

Q. The Bank of America records, which you have before you, reflect, do they not, that that sum was withdrawn from Account No. 3941 and deposited in the commercial account of Mrs. Olender?

A. Withdrawal from the savings account of Mrs. J. Olender and deposited to the commercial account of Mrs. J. Olender on December 15th, 1944, yes.

Q. And does the commercial account reflect any similar [1080] withdrawal on the same, approximately the same date?

A. Just a deposit on December 15th. There were no withdrawals of amounts like that for the next several months.

Q. Now, calling your attention to the item on Schedule 4, July 5, gift from mother, \$2500. You examined the records of the Security First National Bank which are in front of you?

A. I didn't bring up the Security's. I have the Bank of America. It's in that envelope on that table, I believe, Mr. Drewes.

Q. (Handing to witness.)

A. Yes, \$2500 we show on Schedule 4.

Q. It is true, is it not, that it is impossible to tell from those records, however, what disposition was

(Testimony of Roland Hellman.)

made of that \$2500, for the reasons the witness heretofore testified to, is that correct?

A. The record indicates a withdrawal of \$2500 on July 5, 1944, from the Security First National Bank. There is nothing to indicate where it went, no.

Q. You have the Government Exhibit No. 25 for identification in front of you?

A. No, I believe it is on the table there. I have a copy of it, which I have been working from. If you want me to work from that—I don't have the official exhibit.

Q. I have it here. I thought you had it. [1081]

A. I have a copy. It's the same thing, I believe.

Q. There is an entry there, is there not, showing that on January 6th, 1944, the sum of \$2,000 was received by the taxpayer as a gift from Mrs. Olender?

A. Yes, this Exhibit 7 refers to gifts from Mrs. J. Olender, mother.

Q. Do not the records which are in front of you, the Bank of America records, show that that sum was withdrawn from Account No. 3941 and deposited in Account No. 126 in the name of Terrys Olender Gambor?

A. Under date of January—there's two dates on here. One, January 4, one January 6, 1944, a withdrawal from savings account No. 3941 signed by Mollie Olender, "Transfer to"—something is scratched out and then written in ink afterward, "Savings account 126." Then there is a deposit

(Testimony of Roland Hellman.)

ticket for savings account 126 showing a transfer from savings account No. 3941 in the amount of \$2,000.

Q. The record which you have before you indicates that there had been no withdrawals whatsoever from Account No. 126 for the period in question, is that correct?

A. No withdrawals, no. Just deposits.

Q. The Government exhibit for identification No. 25 reflects—particularly with respect to what is called Exhibit 7—reflects next a gift from Mrs. Olender to the taxpayer on March 31, 1943, in the amount of \$1,000, does it [1082] not?

A. Yes.

Q. Do not the bank records which you have before you reflect that on that date the sum of \$1000 was taken from Account No. 3941 and deposited in the commercial account of Mrs. Olender?

A. \$1000 withdrawn on March 31, 1943, and a deposit to the commercial account on the same date of Mrs. J. Olender.

Q. Now the next item on Government Exhibit 25 for identification reflects that on February 3, 1942, a gift was made from Mrs. Olender to the taxpayer in the amount of \$1,000, does it not?

A. Yes.

Q. And do not the bank records which you have before you reflect that on February 3, 1942, the sum of \$1000 was taken from Account No. 3941 and deposited into Account 2146, which was another savings account of Mrs. Olender?

(Testimony of Roland Hellman.)

A. Yes, that's right.

Q. And does Account 3941 reflect a similar withdrawal at or near that date?

A. That was the February 3, 1942, item?

Q. Yes.

A. A deposit in here as of January 31, 1942. The ticket—

Q. But no matter. It was testified by Mr. McNab yesterday afternoon that is the fact. Do you so recall? [1083]

A. Just the difference in the dates from January 31 to February—the tickets of February—. The reason for that is—. But there is—there is no other withdrawal, other than the \$200 item on February 3 of '42, and no more that month.

Q. Will you put the exhibit together again, Mr. Hellman.

A. I don't know if I can get them back exactly the way they were.

Q. In the proper envelopes, I mean.

A. Oh, I see. Do you want to put the Security's down here on the bottom.

Q. Mr. Hellman, you prepared Schedule 4, as you have testified? A. That is correct.

Q. Now as a licensed public accountant, in view of the evidence which you have just examined, is it still your opinion that a gift from Mollie Olender in the amount of \$2500 on July 5, 1944, gift of \$1,000 on December 15, 1944, and the gift for \$3,000 on January 2, 1945, should remain in Schedule 4?

A. Yes.

(Testimony of Roland Hellman.)

Q. Has anything occurred to refresh your recollection, Mr. Hellman, as to when Mr. Olender first told you about duplicate gifts to his sister?

A. I believe it was the early part of last week when we [1084] were going over Schedule 4, at that time making up the schedule itself and revising, and the question came up as to how we could tell on the gifts, and prior to that time we had discussed these gifts—we had looked at Mr. Ringo's Exhibit 7, here, that we were just quoting from, and inasmuch as we found so many errors we couldn't take any of these figures to be correct, so we decided in these particular items Mr. Olender—Mr. Olender stated to us, to me, along with Mr. Lieberman as we were talking over the schedule, that he had received gifts from his mother totalling this amount of \$10,500. Now this Exhibit 4 doesn't purport to be, as far as the dates—the exact dates of the transfers—they could have occurred one day, a week or even a month at a different date—but it was in an attempt to reconstruct. Mr. Olender stated that he received this much in gifts, of which a portion of it would have come over a certain period of time——

Q. Let me interrupt——

A. We took his word for it and put it down on our schedule.

Q. Did you have this discussion with Mr. Olender before or after Mr. McNab testified yesterday?

A. I have answered you twice, Mr. Drewes, that I talked to him prior to yesterday.

Q. Did you have that discussion before or after

(Testimony of Roland Hellman.)

I examined Mr. Olender on Tuesday, September 23, concerning the gifts [1085] from his mother to which we are referring?

A. I couldn't be sure. I wasn't in Court on that day and I don't know whether it came that same day or before that. I couldn't be certain.

Q. Did you discuss his testimony in Court on that subject during this conversation to which you refer?

A. I don't know whether we discussed it being in the light of the testimony in that respect. I know we did discuss the gifts at that time during last week.

Q. Who was present at the discussion?

A. Mr. Olender, Mr. Lieberman, possibly Mr. Lewis. I don't know. Sometimes Mr. Lieberman, Mr. Lewis would leave the office or usually, though, inasmuch as Mr. Lieberman had done lots of prior work on this schedule or in his work on the case, he was much more familiar with the items and he was always in on the discussions.

Q. Where did this discussion take place, Mr. Hellman?

A. Well, most of our discussions either took place in Mr. Lewis' office, adjoining Mr. Lieberman's, and that adjoins mine. It could have been one of the three offices.

Q. Mr. Hellman, when did you first become aware of the fact that the Government had subpoenaed the records of Mrs. Olender on the Bank of America and the Security First National Bank of Fresno?

(Testimony of Roland Hellman.)

A. I suppose it was some time last week when the men from [1086] the bank were here. I wasn't sure what records they had subpoenaed. But it was known that they were from that bank. It was assumed that that was possibly—but I didn't know for a fact——

Q. It was assumed those were the bank records of Mrs. Olender?

A. Not necessarily Mrs. Olender, no. Just from the bank, Security First National Bank in Fresno. I don't believe we discussed any transactions on that bank that I can remember.

Q. Was the discussion had in the presence of the defendant, and with the defendant, to which you have testified? Strike that. Did the conversation with the defendant and in his presence, to which you have testified concerning duplicate gifts to himself and to his sister take place before or after you had learned that the Government had subpoenaed bank records in Fresno?

A. Well, my memory, if it serves me, the bank men from the bank were here, that was the first day last week, a week ago last Wednesday,—that was the first day I was in court, and I know we had talked about it actually before I had come into court. I don't think I knew of their presence until that day that I did come into court. So I would say we had discussed it prior to the time I knew about the men from Fresno, from the Fresno bank being here.

Q. You have testified, Mr. Hellman, that you

(Testimony of Roland Hellman.)

determined [1087] that you could not rely on the work done by Mr. Ringo.

A. Not entirely, no.

Q. You mean you did not testify entirely or you could not rely entirely?

A. Yes, I stated we found inaccuracies in Mr. Ringo's work and——

Q. You know that Mr. Ringo prepared Government's Exhibits 24 and 25 for identification, do you not? A. Yes.

Q. I call your attention to your Schedule 4, which you have testified was prepared by yourself. On July 5, on December 15, on December 16, and on January 2nd are items which are definitely keyed into the Ringo—strike that—definitely keyed into the Exhibits 24 and 25 for identification.

A. You mean the gift items, the additions?

Q. The gift items——

A. You didn't call the year and I didn't follow the dates that you were calling out. It was——

Q. I am referring to the three gift items.

A. Yes.

Q. The item on December 16, with reference to purchase of Treasury bonds. In each of those cases you will note that you referred to the Government Exhibit 25 for identification as the source of your information.

A. As a reference to it because that is the way the [1088] approximate times that we set forth this money, Mrs. Olender gifts, of having been received. There was no exact way to determine the date, and

(Testimony of Roland Hellman.)

inasmuch as his statement was that he received gifts the same time as his sister did, why, we just used the same dates.

Q. I am going to interrupt you because you didn't understand my question. If you did not find Exhibit 25 reliable as prepared by Mr. Ringo, why did you obviously rely thereon in connection with at least four of the entries included in Schedule 4?

A. I didn't rely entirely on this. I stated several times it was upon further discussion with Mr. Olender that those items were added onto the Schedule 4.

Q. Do you not on at least four occasions, Mr. Hellman, refer to Exhibit 25 as the source of evidence upon which Schedule 4 is predicated?

A. There I see three references to Exhibit 24—U. S. Exhibit 24, Exhibit 7, Schedule A.

Q. Didn't you testify that that work was unreliable?

A. As I stated, that was used as reference to this schedule here to be able to identify——

Q. Didn't you include those references on Schedule 4 for the purpose of reflecting the authority upon which you based the items that are referred to therein, wasn't that the purpose of putting—— [1089]

A. To identify the source or to relate to the instance, the time?

Q. To identify the evidence upon which you predicate the items to which it refers?

A. I couldn't because this was not—these items

(Testimony of Roland Hellman.)

were not actually able to be traced and there is no—we didn't actually use this—we did make reference to the schedule but only after it was discussed and the gifts from his mother being established. I didn't know for a fact—

Q. I am going to ask the question once more in another form and ask you to give me a direct answer, Mr. Hellman. I have called your attention to four specific items which appear on Schedule 4. With respect to each of those there is a reference to the Government Exhibit 24. Is that not true?

A. I only see three items.

Q. I call your attention to—

A. I see—wait a minute. I see—the purchase of bonds also.

Q. On December 16.

A. Yes, I see that.

Q. Each one of those contains a reference to the U. S. Exhibit No. 24, is that correct?

A. That's right, yes.

Q. Did you not include those references for the purpose of [1090] indicating the source upon which you relied in support of those particular items in Schedule 4? A. Merely as a reference.

Q. As a reference for what purpose, Mr. Hellman?

A. To associate the gifts received by Mr. Olender from his mother. This Schedule 7, this exhibit—as it is now, Exhibit 25 and not 24,—

Q. One of the items to which I refer has nothing to do with gifts. It refers to the purchase of \$8,000

(Testimony of Roland Hellman.)

in Treasury bonds. In each of those four items a reference is made to the Government Exhibit 24. Did you or did you not include those references for the purpose of indicating the source of evidence upon which you relied or depended in support of those items?

A. I did not depend entirely upon Schedule 25, no,—or Exhibit 25.

Q. You depended in part, did you not?

A. As a reference, yes.

Q. Now turning your attention, Mr. Hellman, to the item “Transfer to bank account,” August 24, \$300,—do you see that?

A. On Schedule 4?

Q. Schedule 4.

A. “Transfer to personal bank account.”

Q. \$300—do you have Schedule 4 before [1091] you? A. Yes, I do. What date is that?

Q. August 24. A. That’s right, yes.

Q. Now in fact on that date there was a deposit to the taxpayer’s personal account in the amount of \$332, isn’t that correct?

A. That is the amount that was in cash. Now I will have to look at my schedule to see if it was the full amount of the deposit. (Examining document.)

No, the full amount of the deposit was \$727.50.

Q. How much of that was cash?

A. \$300—well, there’s thirty-two—\$300—and there’s 32 cents in coin.

Q. Why did you leave the 32 cents off?

(Testimony of Roland Hellman.)

A. Probably a mathematical error, which we all make sometimes.

Q. And now turning your attention in the same column to the next item, December 16, purchase of Treasury bonds, the amount of \$8,000. Upon what do you base that, Mr. Hellman?

A. It was originally indicated in the sources there that is mentioned, that that item——

Q. You saw the source mentioned—you mean Exhibit 24?

A. 24, yes. I have a revised sheet on that because there were some other errors on that sheet which——

Q. Some other errors on what sheet? [1092]

A. Exhibit 3 on page 1 of Exhibit 25. Those items—the store check of 19—the store check was issued for \$5000 on that particular purchase of bonds and there's another cash item of \$8,000, the \$13,000, I believe on that item there, inasmuch as the only dispute of the bonds was the question of the \$20,000 of the mother's bonds, and that had been the figure on there. There was no further attempt to actually determine that that was an erroneous figure. It tied in with the other bonds. We reconciled the purchase of the bonds and it was, with a few exceptions, in accordance with this Exhibit 3, and we used that figure of cash of \$8,000.

Q. How do you know that that \$8,000 came from the vault?

A. On Mr. Olender's testimony.

(Testimony of Roland Hellman.)

Q. You were not able to verify that in any way?

A. I think I stated the other day I wasn't in the vault when he took it out.

Q. You found no record of it?

A. There are no records of the ins and outs of the vault.

Q. The next item, Mr. Hellman, concerns the Barney transaction. I understand that you relied upon the cashier's checks which are in evidence and and upon the entry in the defendant's books, is that correct?

A. On the cashier's checks and upon the statement of Mr. Olender that he used money from the vault, cash, safe deposit [1093] box, to purchase those checks with.

Q. The purchases were also entered in the defendant's books, were they not? A. Yes.

Q. And when were the purchases made?

A. They were really made, I believe, in November. I think the December is in error on there. As a matter of fact, I am—If you will show me the book I can give you the exact—I thought it was a mistake in retyping this. I didn't think it was correct.

Q. In any event, it was either in November or December?

A. I am almost sure it was all in November.

Q. Do you recall when the entry was made reflecting those purchases in the defendant's books?

A. In the December purchase register.

Q. Mr. Hellman, there has been testimony with

(Testimony of Roland Hellman.)

respect to certain transactions with Money Back Smith. Do you recall that testimony?

A. Yes.

Q. Why have you not included the Money Back Smith transaction in Schedule 4?

A. This Schedule 4 starts as of May 5, 1944. The Money Back Smith transactions occurred prior to that date and it was testified that the cash was or the cash was paid prior to this date. Therefore, it would not have any effect [1094] on the ins or outs of the box since it occurred prior to May 5, 1944, date.

Q. How do you know it occurred prior to that date, Mr. Hellman?

A. Because the purchase register of the Army-Navy Store, principally in reliance of—

Q. Do you recall what the entries were? I will be glad to get the exhibit for you, if you don't remember?

A. Yes, I believe—You might give it to me. I am sure I can state it correctly. I am almost sure I can state what it is.

Q. I don't recall the number of the book. I see a purchase register indicated here. Do you have them all there, Mr. Hellman, or is there still another book?

A. No. The general journal and the purchase register are the two smaller books.

Q. The two smaller?

A. Yes, the two smaller ones than these.

Q. Here they are (handing to witness).

(Testimony of Roland Hellman.)

A. These items were entered in the purchase register along with the December invoices but they were dated February 8th and 3rd, 2nd, 24th, 24th, March 15, March 8, and March 2nd.

Q. You are reading from the entries in the purchase register, aren't you?

A. That's right. [1095]

Q. And the invoices bore those dates as reflected by the entries in the purchase register?

A. That's right.

Q. Have you seen the invoices?

A. From Money Back Smith?

Q. Yes.

A. No. No, they can't locate those invoices. We have been looking for them for weeks.

Q. Do you know why the entry was made in December, Mr. Hellman, although it was indicated the purchases were made—

A. I wouldn't have any personal knowledge. I believe the bookkeeper testified the other day—I don't think she actually knew either. I made an assumption why, but that's—

Q. Well, Mr. Hellman?

A. Inasmuch as these books—this was actually written by the bookkeeper back in 1944.

Q. She testified she didn't know either. Do you recall that?

A. Why they would misstate the date on the invoices, there is no particular reason to do it.

Q. You haven't seen the invoices?

A. No, no, I said I haven't.

(Testimony of Roland Hellman.)

Q. And you don't know whether they were paid for in cash or not, do you?

A. Other than through Mr. Olender's [1096] testimony.

Q. What was his testimony, to the best of your recollection?

A. And also the books indicate he paid for it by cash, which was put in the books eight years ago.

Q. Where does that appear?

A. That they were paid in cash?

Q. Yes.

A. Actually stated in cash, I don't believe. Yes, on, I believe, page 17 of the general journal, under date February 28, 1945, there is a debit to accounts payable for \$6903.02, and a credit to M. Olender investment account for \$6903.02, with an explanation: "To record cash payments covering purchases from Money Back Smith and Barney's Clothes Shop."

Q. Oh, that is the adjusting entry to which there has been testimony before, is it not?

A. That is the entry which the bookkeeper testified about as being a correction entry.

Q. But it cannot be determined exactly when the payments were made to Money Back Smith, isn't that correct?

A. The exact date could not be determined, no.

Q. You are relying on the books as they reflect the purchase date?

A. That's right.

(Testimony of Roland Hellman.)

Q. And assuming at that time payment was made on the purchase date?

A. Well, the purchase date or within thirty days, as was [1097] testified, that a lot of payments were made in cash. I believe Mr. Olender stated in this specific instance he had to send cash in advance.

Q. It is true, is it not, Mr. Hellman, you have assumed that all of the purchases made by Mr. Olender from Money Back Smith were paid for with cash?

A. I don't think it is an assumption. When something was written in the books five or seven years ago and that's their bookkeeping records—and they have been proven to be correct, except for one item—there is no reason to doubt them.

Q. Do you recall Mr. Olender's testimony as to the Money Back Smith purchases?

A. I wouldn't say in detail.

Q. Do you recall whether he testified that he had made all purchases in cash?

A. It is my recollection that he testified to that. You would have to read the transcript to be sure. I wouldn't state for sure.

Q. You have referred to a journal entry adjusting the Money Back Smith transaction by debiting purchases and crediting investment account. Was that correct?

A. Debiting—

Q. Was that a journal entry?

A. No, accounts payable, because when they were posted— [1098] when they were written up in the purchase register there was a debit to purchases

(Testimony of Roland Hellman.)

and a credit to accounts payable, and the reverse suggesting was to debit accounts payable and credit investment.

Q. What is the date of that entry?

A. The journal entry?

Q. Yes.

A. Under date of February 28, 1945.

Q. Wouldn't you assume, Mr. Hellman, that the cash payment had been made as of the date of that journal entry?

A. Not with the explanation that follows it, no, you would have to assume nothing because the journal entry fully describes—No, in this instance here, which is what I did too, was to trace back, trace this back——

Q. Why don't you read that entry?

A. I read it once. Would you like me to read it again?

Q. Yes, read it again.

A. (Reading): "February 28, 1945, debit accounts payable \$6903.02. Credit item Olender investment account \$6903.02. To record cash payment covering purchases from Money Back Smith and Barney's Clothes Shop."

Now we went—How that item was traced down, was to go back to the accounts payable register. To go back, and upon locating these items that we referred to before in the purchase register as of February and March, 1944, items, [1099] by adding those up, getting, taking the total of that, and then the total of the Barney's items, which are also men-

(Testimony of Roland Hellman.)

tioned in the journal entry, those items all in one group come to that exact figure.

Q. Is it not true that the journal entry is the only evidence you have as to date of payment of those invoices?

A. The journal entry doesn't evidence the date of payment, no.

Q. But it would be some indication of the date of payment, would it not?

A. No, the date of—indicating the payment, would be the date that the invoice was shown as on the purchase register. Now it's normal in most businesses bills are paid within thirty days, some of them for cash. If an invoice was dated on the books as of February, there is no reason to believe it wasn't February.

Q. Don't you recall when Mrs. Manger testified as to the reason that the entries were made in the purchase register in December, that she suggested that it might have been because the goods were being held for the purpose of returning them?

A. That could be.

Q. The entry was not made until December for that possible reason. If that was so, if that was so and then it was elected to keep the merchandise, the entries were made in [1100] the purchase register in December and the goods were thereupon paid for, that the item would have been—the whole transaction would have been consummated as a purchase and payment therefor in December of 1945.

(Testimony of Roland Hellman.)

A. I don't—I think I was a little bit—I didn't follow you.

Q. Let me restate it.

A. Rephrase it.

Q. The invoices state that the merchandise was purchased early in the year? A. '44, yes.

Q. '44. The bookkeeper testified that they were not—testified as a possible reason why they were not entered in the purchase register until December of that year was possibly because the merchandise might have been returned?

A. They intended to return it.

Q. Intended to return it? A. Yes.

Q. Now if that were assumed to be so and if it were then decided by Mr. Olender he would keep the goods, would it not follow that the entries would be made in the purchase register in December and the goods would be paid for at that time?

A. I don't think that any firm would let you keep goods for ten months before paying for them if you intended to just on the premise that you might return them. If you will show me [1101] the——

Mr. Drewes: I would like to ask that be stricken as non-responsive, your Honor.

A. I think it is very pertinent to the question you asked.

Mr. Drewes: That is not for you to decide, Mr. Hellman.

The Court: Well, it is in the nature of an argument. However, I suppose it has some responsive-

(Testimony of Roland Hellman.)

ness. It may remain in the record. It is an argument.

Q. (By Mr. Drewes): Let me restate the question again. I asked you if it were not possible under the assumption that the goods had been held for that reason that it is possible they were to be returned, the decision then being made to keep the goods, the entries would be made in the purchase register in December and that they would then be paid for in that month.

A. Based upon those assumptions, it is possible.

Q. It is possible? A. Yes.

Q. And if that were so, then the transaction should be included in Schedule 4 along with the Barney transaction, would that be correct?

A. As a withdrawal from cash in the box? No,—now—

Q. What?

A. If you say they—wrote them up in December '44 and then had paid for them, also assuming that they paid for them in [1102] December of '44?

Q. Mr. Hellman, you said that they had—I asked you initially, when we began this series of questions and responses, why you had not included the Money Back Smith transaction along with the Barney transaction.

A. That's right. Well, the answer would be—

Q. Your answer was because you had assumed that payment had been made before May 5—before the starting point of Schedule 4?

A. On the Barney or the Smith's?

(Testimony of Roland Hellman.)

Q. On the Smith's? A. Yes.

Q. If in fact payment had been made in December of 1944, then you would properly include the Money Back Smith transaction with the Barney transaction?

A. Yes, if I could not locate the payment being made from the store books.

Q. Well, you could not locate it, could you?

A. I didn't make any attempt. It would have been ridiculous to look at that spot for it. It's quite an assumption.

Q. Directing your attention next, Mr. Hellman, to the item, "Cash received from Fresno partnership," January 2nd, 1945, the amount of \$1807.46, and further down Schedule 4 a similar item, January, 1946, "Cash received from Fresno partnership," \$1725.11. [1103]

Upon what evidence do you base those two items?

A. Based upon the partnership income that Mr. Olender had reported for the year prior to the date that is shown there. In other words, partnership income from the Fresno partnership for 1944 was that amount plus—We took the amount reported and added depreciation, and that's the figure, and we showed as being received the first part of the year because Mr. Olender's statement was that he received it some time after the close of the year. He has testified to that, I believe. I don't know if he testified as to receiving it after the first part of the year, but he has testified to the money coming in in the form of cash.

(Testimony of Roland Hellman.)

Q. You relied entirely upon his testimony?

A. That and the income reported on the partnership return and his individual tax return, yes. As to the dates, was his testimony or information furnished me.

Q. Those two items are not included on your first schedule, were they included?

A. No, those items came out and we revised this schedule as I said several times, that these schedules can never be complete or you always find something one way or the other that belongs in or out. We worked on it, revised it. We think we have it fairly complete. We could find another item in or out.

Q. How did you find those two items?

A. During the controversy over the capital gain on the [1104] partnership in the income therefor, it dawned on us that we hadn't shown that on this schedule. Mr. Olender made the statement that that had come in in the form—would have gone into the safety deposit box in cash and mingled with his other cash, and so we decided it is proper to enter it in there.

Q. Did you look to see whether it had been entered in any other records of the taxpayer?

A. It wasn't entered on the store records. That was the only regular books he had. It wasn't entered as a deposit in his personal bank account.

Q. Was it entered in any other account?

A. Such as—

Q. Trustee accounts or his wife's account?

(Testimony of Roland Hellman.)

A. The partnership income?

Q. His income. The two items we are referring to.

A. No, I didn't find those in any other account.

Q. Were you able to find any record indicating the date upon which those receipts were—pardon me—the date upon which those funds were received by Mr. Olender?

A. Any record as to specific dates?

Q. Yes. A. No.

Q. Now with respect to the May 31, 1945 entry, there are on Schedule 4, Mr. Hellman, four items which total \$15,000, [1105] each referring to the cashier's check which is indicated by number. Upon what do you base those items, Mr. Hellman?

A. Well, that is based on information I secured from the Bank of America, upon visiting there, as to the numbers, and the dates, and the disposition of those checks was traced—the first one of \$3,000, that was traced to the deposit of—well, the bank actually traced it into the Army and Navy Store deposit of June 20, 1945.

The next item of \$3500 and \$3500, those checks indicated that they were purchased—they were used to purchase Treasury bonds at the Bank of America, College Avenue Branch, and Mr. Olender could confirm through some friend working there at that bank that he did purchase bonds there in that amount; and the other item was traced into the deposit of the Army & Navy Store as of June 20,

(Testimony of Roland Hellman.)

1945, and Mr. Olender has also testified to these transactions.

Q. Were you able to verify the sources of the funds?

A. Only to the extent that they were purchased with cash.

Q. Were you able to verify from where the cash came? A. Verify?

Q. Yes.

A. Is that—I couldn't verify it because I wasn't there when the cash was taken out. But I rely upon Mr. Olender's testimony that he took the cash in the vault.

Q. Now, with respect to the item of August 27, "Transfer to [1106] personal bank account," \$522—do you see that item? A. Yes.

Q. Is that item correct, Mr. Hellman?

A. Correct——

Q. Or is there another small error there?

A. Do you mean is that the amount of the deposit?

Q. Yes.

A. August 27, 1945, no, there is seventy-five cents change there, too. That total deposit for that date was \$854.88 and it included cash of \$522 and 75 cents coin. There were nine little miscellaneous checks totalling \$332.13.

Q. Did the coin come from the safe deposit vault, too?

A. Well, that's probably why I left it off because you wouldn't make an assumption that the change

(Testimony of Roland Hellman.)

came in there. I believe, though,—I might have—do you mind if I refer to these exhibits here?

The Court: We might take a short recess, and counsel can show the exhibits to the witness.

The same admonition.

(Short recess taken.)

Q. (By Mr. Drewes): Is there a pending question?

A. I think I was trying to explain the odd cents in that deposit there, the cash.

The reason for that is that the amount of deposit was to bring in his balance to an even \$1000 as of August 27, [1107] 1945.

Q. Why did you leave this 75 cents off?

A. There is no particular reason why. I see one place we did include the pennies and the two other places we did not.

Q. You are referring to the item of July 10, 1946, "Transfer to personal account," \$570.38?

A. Yes, that's right.

Q. Calling your attention to the next item, "November—purchase U. S. Treasury bonds, \$5000," upon what do you base that item?

A. That was based upon Mr. Olender's testimony as to the source of the funds to pay for it.

Q. Did you verify that?

A. You keep asking "verify." Do you mean by verifying to actually see the transaction? That's a general description of verifying, to actually see something.

(Testimony of Roland Hellman.)

Q. You're a public accountant. What does verify mean?

A. That's just what I am telling you. It means to actually see and verify. We're talking about something that happened seven years ago. How could I verify the withdrawal?

Q. Don't accountants frequently verify——

A. They attempt to.

Q. ——books of account some time after the records have been made?

A. You can verify it through a book of account, yes, if [1108] there is one kept. It has been previously stated there is no record that was kept of the withdrawals from the cash box or the amounts going in. This is only a reconstruction.

Q. Then you didn't verify that item?

A. Not that I actually saw it, no. It is based upon testimony of Mr. Olender.

Q. You haven't been able to verify it from any records that you were able to find?

A. No, except that the bonds were——once again the bonds were an item——the only dispute in the bonds were the \$20,000 that were the mother's bonds.

Q. Beyond the fact that bonds were purchased, you were not able to verify that item, is that correct?

A. That's——oh, just a second——I have——well, that item, yes——Merely on the testimony of Mr. Olender the fact that the bonds were purchased and——

Q. The next item is the November item, "Trans-

(Testimony of Roland Hellman.)

fer to savings accounts"—the three accounts listed, all trustee accounts, and in each case the amount shown is \$5,000. Upon what do you base those items?

A. There are exhibits in evidence of the deposits being made in these trustee accounts and evidence of the TCR's that that plus the \$10,000 item following, that there was \$25,000 cash deposits in the commercial account—commercial—well, the TCR's say all commercial, but the savings accounts [1109] are not considered commercial accounts. The \$10,000 personal account would be commercial. And there is also testimony to the effect—

Q. Considering that all of those four items together in the amount of \$25,000, were you able to verify the cash used therefor came from the box?

A. Not from any written records.

Q. The items shown in 1946, the respective dates: May 1st, 2nd, July 10, September 18th, September 23, November 25, December 4, December 20, excluding the down payment at W. & J. Sloane, were you able to verify the deposits in the accounts shown?

A. Yes.

Q. That they came from the—

A. Excuse me—

Q. —the safe deposit vault?

A. Not that they came from the vault. I verified where they went.

Q. In each one of those cases each item represents a receipt for a deposit in the accounts which are described there, is that correct?

(Testimony of Roland Hellman.)

A. As to the exhibits that are in evidence, yes, they indicate going into those accounts.

Q. But you were unable to verify the sources of deposit?

A. No written verification, no. [1110]

Q. Now calling your attention to the item, "Non-deductible expenditures included in stipulation," \$1340.40. What does that represent, Mr. Hellman?

A. That item represents an amount that we verified with Mr. Mytinger as to being what was in the stipulation as to cash expenditures.

Q. You verified it with Mr. Mytinger?

A. Mr. Lieberman did, and he passed the information on to me.

Q. Do you know what that item consists of?

A. It is for non-deductible expenditures, personal payments made with cash. I don't know the exact—who cash payments were made to, no.

Q. Do you know of what it consists?

A. It's covered by stipulation, Mr. Drewes.

Q. That item doesn't appear in the stipulation, does it?

A. Not on the stipulation, but it was relayed—the information as to that amount was relayed to Mr. Lieberman by Mr. Mytinger as being part of the stipulation. If that is a specific item does not, but I understand there was some argument on the amounts in the stipulation, and that was the figure that Mr. Mytinger gave Mr. Lieberman.

Q. Do you know if that figure shown there is correct?

A. Only through what Mr. Mytinger told Mr.

(Testimony of Roland Hellman.)

Liberman. If Mr. Mytinger made a mistake, I don't know, other than the [1111] information was passed on to me.

Q. You prepared this schedule, didn't you?

A. That's right.

Q. You don't know whether that figure is correct or not?

A. It is an item covered by stipulation, Mr. Drewes, as to how much cash was spent. If your own Government agent tells us that that is the amount stipulated to, we accept that particular figure.

Mr. Drewes: May that be stricken as non-responsive, your Honor?

The Court: Motion denied.

Q. (By Mr. Drewes): Now, Mr. Hellman, do you recall testimony by Mrs. Widrin to the effect that she gave to Mr. Olender approximately \$575 in 1945?

A. I recall reading about it.

Q. You recall that in the transcript?

A. Yes.

Q. That is not included in Schedule 4?

A. No, that and the other \$2500 gift were considered as a wash item and were not put in there.

Q. What do you mean by wash item, Mr. Hellman, for the benefit of the Jury?

A. The money was given to Mrs. Olender. It was given to Mr. Olender and passed on to her. It was a wash item.

Q. I assume you mean then that the money went in and out in [1112] the same period?

(Testimony of Roland Hellman.)

A. That's right.

Q. If the funds were in the possession of the taxpayer at the time in 1945 or 1946 and were not dispensed—disbursed by him in either one of those years, it would be on the schedule, is that what you mean?

A. Yes, if he hadn't—they would be included on there if they hadn't been paid out yet.

Q. Will you turn to Schedule 3 and 3-A, Mr. Hellman?

A. I have them here.

Q. I call your attention to Schedule 3-A particularly.

A. Amended 3-A?

Q. Yes, the amended 3-A.

A. Yes.

Q. Halfway down the page you show non-deductible gifts received as a deduction January 2nd, 1945, Mollie Olender, \$3,000. What is that item?

A. That was a gift shown as being received from Mollie Olender, mother, going through and not being an income item. It was deducted from the total income.

Q. And that item comes allegedly from the taxpayer—strike that—that gift allegedly came from Mrs. Mollie Olender's bank account in Fresno, did it not?

A. From where?

Q. That gift allegedly had its origin in Mrs. Olender's [1113] saving account in Fresno?

A. That is not my understanding, no.

Q. What is it?

A. That was a gift from Mrs. Olender to Mr.

(Testimony of Roland Hellman.)

Olender of which we are not certain as to the source of the funds.

Q. Do you still have Exhibit 25 for identification? A. Yes.

Q. Let me call your attention to the last item on the last page of Exhibit 25 for identification, January 12, 1945, \$3,000 withdrawn from savings account, Fresno. Is that not the same item?

A. I testified about twenty minutes ago that it was not, as far as I knew.

Q. Now with respect to the next item shown as a non-taxable—strike that—as a gift received by the taxpayer August 24, 1945, Mrs. Widrin, \$575.

Isn't that the money which Mrs. Widrin testified she gave to the taxpayer in 1945?

A. That's right.

Q. And wasn't the purpose of that transaction to defray the funeral expenses of Mrs. Foote?

A. I believe that is the way the testimony reads.

Q. And you have examined the cancelled checks of the taxpayer, have you not, for the year 1945, which are in evidence in defendant's Exhibit [1114] AF?

A. I have gone through them, yes.

Q. I call your attention to a check dated September 12, 1945, in the amount of \$407.27. You recall that check?

A. I have seen this check, yes.

Q. And is there not a notation on that check?

A. Yes, it is made out to Mr. Gray & Company, which is, I believe—I know is a funeral parlor in San

(Testimony of Roland Hellman.)

Francisco, \$407.27. Marked on the bottom "From Mrs. Foote's personal account." Dated September 12th, 1945.

Q. May I see them? I show you another check included in Defendant's Exhibit AF dated August 26, 1945, in the amount of \$110—some odd cents——

A. \$110 even, I believe.

Q. And who is the payee of that check?

A. Belmont Memorial Park Cemetery Association.

Q. Mr. Hellman, wouldn't those two checks indicate to you that the sum which was conveyed by Mrs. Widrin to the taxpayer was disbursed for the purposes indicated in the same year?

A. That's right.

Q. Then is it your opinion that the amount of \$575 should be deducted from Schedule 3-A?

A. The money went into his personal bank account, so the funds came out—it would be part of his deposits going through the bank.

Q. This represents another, which you referred to as a wash [1115] entry, does it not?

A. It would, inasmuch as the deposit was made in August—the money went out in August and September—it would be a wash item.

Q. Then should that be deducted from the taxpayer's income for that year as you have indicated on Schedule 3-A?

A. Inasmuch as the disbursements were made prior to the close of the year, that amount would not appear in the commercial bank account balance

(Testimony of Roland Hellman.)

as of the end of the year. If this amount is not—it is included in the non-capital expenditures, it would be correct there. If it is not, then it would not belong there.

Q. What is your conclusion, Mr. Hellman? The money was given to the taxpayer by Mrs. Widrin for specific purposes, to use it for that purpose in the same year. What is your result?

A. I don't see it referred to here in the stipulation. Although there was a—if that item is not in the stipulation, it doesn't belong there, and I don't see whether it is included in the stipulation or not. Now, this isn't all of the total amount stipulated to as non-capital expenditures—non-deductible expenditures.

Q. Your conclusion is then that it is not included in the stipulation, therefore it should go out, is that correct?

A. Yes. [1116]

Q. Now, Mr. Hellman, calling your attention to the next item, August 24, 1945, Mrs. Foote, \$2500. Will you explain that item?

A. That was a gift received by Mr. Olender. I believe there is testimony on that from Mrs. Foote in 1945.

Q. Do you recall Mr. Olender's testimony as to the disposition of that item?

A. No, I can't say that I recall just what it was.

Q. You read the transcript?

A. Yes, I looked at the transcript. There's just about a thousand and some odd pages. It's rather

(Testimony of Roland Hellman.)

difficult to remember everything you hear and read, questions and answers that have been asked.

Q. Do you recall Mr. Olender's testimony as to his disposition of that \$2500?

A. I can't—

Q. What he did with it?

A. Offhand I can't say that I do recall it. You would have to refresh my memory on his testimony.

Q. Didn't Mr. Olender testify that he put that money in his safe deposit vault?

A. With reference to this specific transaction?

Q. With respect to the \$2500 that he received from Mrs. Foote?

A. I can't say for certain. If it's in the transcript, it's [1117] there.

Q. I will refresh your recollection by reading from page 891, which is in Volume 12, counsel, beginning at line 17:

“Is it now your testimony that \$3,000 of that money was or was not money of your mother-in-law, Mrs. Foote?

“A. It was.

“Q. It was money of your mother-in-law's, Mrs. Foote? A. That's right.

“Q. And under what circumstances did your mother-in-law give you that \$3,000?

“A. Part of it came from Mrs. Widrin, as she testified, and I had the balance and I had the money in my safe deposit box.”

Does that refresh your recollection?

A. Yes, as to the statement that it was in the box, yes.

(Testimony of Roland Hellman.)

Q. Mr. Hellman, shouldn't that sum of \$2500 be included in cash in the vault in 1945?

A. As an addition, you mean?

Q. Yes.

A. If the cash was on hand in the box and there is testimony—

Q. That he put it there?

A. Yes. That was the testimony of a few days ago. If that belongs in there, that should be an addition in the box, [1118] that's right.

Q. And what effect will that have on Schedule 4?

A. That item alone, assuming that we have found all other additions and withdrawals, would affect the balance of cash at the end of '45 by \$2500, and depending—then this item—that was taken out of Schedule 4 down there—the Magnin and Gray Company, which I don't know has ever been settled or not—would add to that balance by \$2500 at the end of 1946.

Q. And what effect would that have on the defendant's income for the year 1945?

A. May I explain a point?

The Court: Yes.

The Witness: May I explain a point regarding that?

The Court: Yes.

A. Well, the income as revised, that would add to your—increase your net worth at the end of '45, therefore increasing the income computed on a net worth basis of '46. You would have a larger opening net worth and a larger closing net worth, so

(Testimony of Roland Hellman.)

there would be no change in '46 if that cash were on hand at the end of '46.

Q. (By Mr. Drewes): There would be no change in '46. What would the effect be on unreported income of the defendant in 1945?

A. On the net worth method that would increase the net worth [1119] at the end of '45. Therefore it would increase the total income, reduce the understatement of—it would increase the understatement of income.

Q. By a similar amount? A. \$2500, yes.

Mr. Drewes: Does your Honor wish to recess at this time?

The Court: Yes. We might take the recess and adjourn until Monday at ten o'clock.

The case will probably go to the Jury, I am informed, ladies and gentlemen, Tuesday or Wednesday at the latest.

Mr. Drewes: My best estimate will be Wednesday.

The Court: You will probably argue the case Tuesday.

Mr. Hagerty: I think so, your Honor.

The Court: We will adjourn then until Monday, at ten o'clock, with the same admonition, not to discuss the case or form an opinion until the matter is submitted to you.

(Thereupon an adjournment was taken until Monday, October 6th, 1952, at ten o'clock [1120] a.m.)

(Testimony of Roland Hellman.)

Monday, October 6, 1952, 10:00 A. M.

The Clerk: United States vs. Olender, on trial.

The Court: The Jury is present.

Mr. Drewes: So stipulated.

The Court: You may continue, gentlemen.

ROLAND HELLMAN

resumed the stand, and having been previously duly sworn, testified further as follows:

The Clerk: Mr. Hellman, will you please restate your name for the record?

A. Roland Hellman.

Cross-Examination

(Continued)

By Mr. Drewes:

Q. Mr. Hellman, calling your attention now to Schedule 3. As has been earlier indicated by you, the upper half of that schedule reflects the taxpayer's net worth as computed by the Government. That is correct?

A. Yes.

Q. And the lower half represents the additions and reductions which the defense contends should be made in computing the computation, is that correct?

A. Yes.

Q. Now calling your attention particularly to the year 1944, under reductions, amount paid for Goodman sailor suits [1121] awaiting disposition, and so forth, \$20,550 even. You have included that figure as an addition upon the assumption that in

(Testimony of Roland Hellman.)

1944 none of those goods had been sold, is that correct? A. Yes.

Q. Were you able to verify that fact, Mr. Hellman?

A. No. Not direct verification as to when the merchandise was actually sold, other than through the testimony of Mr. Olender and Mr. Leavy and——

Q. But you do not know as the result of your audit that those suits remained on hand as of December 31, 1944?

A. No, I couldn't verify the physical inventory of those suits.

Q. If, in fact, any part of those suits had been sold, what would be the effect from an accounting point of view with respect to the net worth position as of December 31, 1944?

A. If some of those suits had been sold, well, either if they had been sold at retail, they presumably would have gone through the register sales. If they had been sold at wholesale lot, at cost, if the money was kept by Mr. Olender, and inasmuch as it never had been on the books, it would be right for him to keep it, but it would have the effect of reducing the available addition.

Q. In other words, to the extent that any of those suits were sold before the date shown, the figure of \$20,550 would have to be reduced accordingly, is that correct? [1122]

A. Yes, unless the—if you assume a sale—and that might—if you do—say, as an example, he sold

(Testimony of Roland Hellman.)

\$5,000 worth in 1944 and that came in in the form of cash, that would correspondingly be an increase, an addition to the Schedule 4, cash on hand—if it were actually cash on hand at that time.

Q. Unless, of course, the sale had been made before May 5, 1944, and in which case the cash would not be included on Schedule 4.

A. Yes, but that—I don't think that is very likely, according—

Q. Well, the entire item is a matter of assumption one way or the other.

A. Except for the delivery of the merchandise.

Q. You have included the figure on the assumption that the inventory was on hand and not sold. Now, if you assume that the merchandise had been sold, the other assumption, and that it had been sold before May, 1944, then it would not be included in the net worth, isn't that correct?

A. That's correct. There are—that schedule, I believe it is 26, showing the dates the merchandise was received in the Goodman transaction, show that none of them was received before May, 1944.

Q. My understanding of the record, Mr. Hellman, is that Mr. Olender testified the goods were received in January or [1123] February of 1944?

A. My recollection is he didn't remember specifically when the merchandise was received. Mr. Ringo's work sheet shows some dates of the Goodman merchandise being received, on that Schedule Exhibit—I believe it is 26.

Q. There was also another purchase of Good-

(Testimony of Roland Hellman.)

man merchandise in the year 1944, was there not?

A. For \$1380, yes.

Q. Was it possible to determine whether receipts to which you refer pertain to that last purchase or to the earlier purchase?

A. Yes, it is, because the earlier purchase shows in—up to \$20,550 of merchandise. So it couldn't be the \$1380 that came in at a later date.

Q. Didn't you tell me you were unable to find any invoices at all concerning the Goodman transaction?

A. No specific invoices, but in going over Mr. Ringo's work papers there appears there a summary right under the cash analysis that he made—there is a summary of the receipt of the Goodman merchandise, and that's on the—it's right in the exhibit there. It's in evidence there.

Q. But that information was received by Mr. Ringo from Mr. Olender, isn't that correct?

A. Mr. Olender told me differently than that, that Mr. Ringo—— [1124]

Mr. Drewes: May that be stricken, your Honor?

Mr. Hagerty: Well, if your Honor please——

Mr. Drewes: We are confined to the record here, and we are—Didn't Mr. Ringo——

The Court: That may go out. That may go out.

Q. (By Mr. Drewes): Didn't Mr. Ringo testify in connection with the exhibit to which you refer that he had gotten that information from Mr. Olender?

A. I don't know if it was in—testified to that

(Testimony of Roland Hellman.)

specific point in full. My understanding was——

Mr. Drewes: May that—I don't want your understanding. We are concerned, Mr. Hellman, with the record as it now appears.

Now I will ask you if it is not your recollection that Mr. Ringo testified that the information concerning the receipt of the Goodman transaction came from Mr. Olender?

A. I can't remember specifically if that is Mr. Ringo's testimony. Do you mean——

Q. Do you remember Mr. Ringo testifying that he was never able to clarify the Goodman transaction in its entirety? A. To that effect, yes.

Q. Mr. Hellman, you recall Mr. Olender testifying that the Goodman suits were not included on his inventories as reported on his tax returns for 1944 and 1945? [1125]

A. When he was testifying to that——

Q. Will you answer my question, Mr. Hellman, and then you can explain. Do you recall that testimony? A. Yes.

Q. Now, in view of that testimony, do you think that it is sound practice to include \$20,550 as being on hand as of December 31, 1944?

A. Yes. Do you want it explained or——?

Mr. Hagerty: You may explain your answer.

A. Well, when Mr. Olender was testifying there was—if you will read the transcript—there was a confusion as to the dates, and he later corrected himself by saying that that merchandise, or a por-

(Testimony of Roland Hellman.)

tion of it, was included in December 31, 1945, but not at December 31, 1944, and the reason I feel that is proper accounting to include this as an addition to the December 31, 1944, net worth is because this was considered as a flow of personal funds up until some time in 1945 when they were able to dispose of some of the suits through wholesale, and those they couldn't dispose of went into the inventory, and if that was a separate asset, such as he had other assets apart from the store business, that would properly be an additional asset at the end of 1944.

Q. (By Mr. Drewes): The Army & Navy Store is a sole proprietorship, isn't it, Mr. Hellman?

A. That's correct. [1126]

Q. It is not a corporation? A. No.

Q. Then either as a matter of law or as a matter of accounting fact and practice is there any basis for making a distinction between the assets owned by a man individually and those which he has in his store which he himself owns alone?

A. It is acknowledged that the—if the transaction had been handled properly on the books, if Mr. Olender had proper accounting procedure, the \$20,550 would have been taken onto the books. But inasmuch as it wasn't, and in locating that error, it is proper accounting practice to correct that error.

Q. Your answer serves to recall earlier testimony, Mr. Hellman, in which you stated that if a business man included on his books both wholesale

(Testimony of Roland Hellman.)

and retail sales, the effect would be to reduce his gross profit and thus distort the operations of the business as reflected by his books, is that correct?

A. I believe I said something to that, yes.

Q. Would you advise a client of yours to leave wholesale sales off his books to avoid that distortion?

A. Certainly not. It would be kept track of separately, not mingled with the retail sales.

Q. As a matter of fact you would advise a client of yours that he should keep whatever books and records are necessary [1127] to enable him to determine what his gross profit is, including inventories and whatever deductions he might have, would you not?

A. Yes, I would advise him to keep the records in all transactions.

Q. As a matter of fact, the law so requires, does it not?

A. It states that records will be kept in order to determine the correct income, yes.

Q. Can income be correctly determined, Mr. Hellman, when only part of the transactions are reflected in the books?

A. No, it couldn't, naturally it couldn't be.

Q. Now turning your attention to the item under reductions, the first item, 1945, 1946, \$20,000—now that represents a reduction in the taxpayer's net worth on the theory that \$20,000 in bonds belonged to his late mother, is that correct?

A. Yes.

(Testimony of Roland Hellman.)

Q. Were you able to verify that those bonds belonged to his mother?

A. I didn't see the physical bonds but there has been testimony by Mr. Ringo and Mr. Olender—

Mr. Drewes: May that be stricken, your Honor?

Q. Just answer my question and then you may explain. Were you able to verify that those bonds belonged to his mother?

A. Verified to the extent possible in an audit of this type, yes. [1128]

Q. And of what did that verification consist?

A. From testimony and from an analysis of Ringo's computation of the total bonds and also—well, that Ringo—and then Ringo's statement and Mr. Olender's testimony.

Q. You base your answer on what you heard Mr. Olender say in Court and what another accountant did?

A. Plus verifying the summary that was made by Mr. Ringo.

Q. Well, you yourself were unable to verify that these bonds belonged to the late Mrs. Olender, is that correct?

A. At this time it would be impossible to verify that.

Q. The records show, I believe, that Mrs. Olender passed away in 1951. Have you ascertained whether or not the \$20,000 worth of bonds which we are discussing have been included in her estate for the purposes of probate?

A. No, I haven't determined that.

(Testimony of Roland Hellman.)

Q. Mr. Hellman, quite early in your testimony on direct examination by defendant's counsel you testified that in 1945 the defendant picked up or included for the first time on his inventory Goodman suits at the value of \$8,550; that, however, he had not included that sum in purchases for the year, and for that reason his gross profit for 1945 was reduced from the sum of \$45,000 to the sum of \$32,000, in round figures. Do you remember that? A. Yes, I do.

Q. You remember that testimony? [1129]

A. Yes.

Q. I want to be certain the ladies and gentlemen of the jury understand just how that works. How is the cost of goods sold determined, Mr. Hellman?

A. You start with your opening inventory, add your purchases during the year, plus any—and then subtract your closing inventory and arrive at your cost of goods sold for the year.

Q. In other words, cost of goods sold equals your beginning inventory plus purchases during the year, minus your ending inventory, is that correct?

A. That's right.

Q. And your testimony was to the effect that in the year 1945 the taxpayer included for the first time \$8,551 in Goodman suits. Inasmuch as he had not also included it in purchases for that year, the result was to understate his cost of goods sold and thus overstate his profits for that year, is that correct?

A. Basically it is correct, but there is a little

(Testimony of Roland Hellman.)

technical difference. Part of it should have been in purchases, not the full \$8,550 was in the inventory. 79—

Q. The 20 suits sold—

A. Thus accounting for that part that would have gone into inventory—

Q. But subtracting the figure from the ending inventory and failing to include it in purchases you overstate—you [1130] understate the amount of your cost of goods sold and therefore you overstate profits, is that correct?

A. You said it understates the cost of goods sold?

Q. By understating the cost of goods sold you overstate profits, right? A. Yes.

Q. Now I am going to hand you the Government Exhibit 9, which is the 1944 tax return for the taxpayer, and ask you to calculate the gross profit ratio for the year 1944 as shown on that return. Do you have paper there?

A. Yes. (Short pause.) 33 plus per cent.

Q. Would you please do likewise from the Government's Exhibit No. 1, which is the taxpayer's return for 1945?

A. 31.9 per cent. Practically 32. 31.9.

Q. I now hand you the Government Exhibit No. 2 which is the taxpayer's 1946 return and ask you if you will calculate the gross profit ratio for that year? A. 38.3 per cent.

Q. What is that again? A. 38.3.

Q. So, Mr. Hellman, whereas you testified that

(Testimony of Roland Hellman.)

the gross profit for the year 1945 had been overstated by a substantial amount, in fact the gross profit ratio for that year was lower than for any of the three years in question, is that correct? [1131]

A. According to those figures, yes.

Mr. Drewes: I have no further questions.

Redirect Examination

By Mr. Lewis:

Q. Mr. Hellman, on the Riverdale Ranch sale I think you were asked to compute the effect of that, and the Wilson transaction, on the taxpayer's income for the year 1946. During the week end did you have an opportunity to make that computation?

A. I have rechecked it, yes.

Q. What is the total net income tax for Mr. and Mrs. Olender on the basis of using the correct estate tax basis as the cost for the Riverdale Ranch and the loss on the Wilson home?

A. That specific item when added to the income tax return as filed, not considering any other changes, would result in a total additional tax of only \$497.64.

I previously told you the maximum would be \$504. I believe the other day I testified, after hasty computation up here, that the tax would have been \$542. But there are several ramifications and technicalities in there which I discovered, and I made the change.

The actual tax on that one transaction would have been \$497.64.

(Testimony of Roland Hellman.)

Q. Friday you were asked by Mr. Drewes concerning the Widrin gift of \$575, which it was testified to here was spent on—a good part of it—on funeral expenses. I notice that at [1132] page 1116 of the transcript Mr. Drewes says:

“Your conclusion then that it is not included in the stipulation, therefore it should go out, is that correct?”

You answered: “Yes.”

Mr. Drewes, didn't you mean by that that your conclusion then is that if it is not included? I think the reporter left out the “if”?

Mr. Drewes: Well, that would complete the question, I am sure.

Mr. Shelton: If your Honor please, I think it would be appropriate if the record would show at this time that that 575 item was not included in the stipulation. I think the defense counsel will concede that.

Mr. Lewis: Well, I haven't got the breakdown. If Mr. Mytinger says it was not, I am satisfied.

Mr. Shelton: Mr. Mytinger, is that correct?

Mr. Mytinger: Yes.

Mr. Shelton: He says it is not, Mr. Lewis. May it then be stipulated it is not included in the stipulation?

Mr. Lewis: Yes.

Mr. Shelton: Thank you.

Mr. Lewis: That can be stipulated.

Q. Now, Mr. Hellman, referring again to the Riverdale and the Wilson home transactions. Will

(Testimony of Roland Hellman.)

you explain to the jury [1133] just how you worked out those computations?

A. Well, I started with the taxable income per the return. I added back—inasmuch as the return of Mr. Olender included the partnership income from Fresno which included the loss of some eighty—close to eighty some odd dollars, his share was \$19.04—I had to add back that portion of the loss of the \$19.04, which came through in the partnership item. Then I added back one-half of the loss on the Wilson Avenue property. Only one-half was added back because the other half of that loss was reported by Betty Olender, Mrs. Olender, and she does not share in the capital gain of the Fresno partnership of the \$2,016 capital gain as adjusted to the error on the basis used. So the \$495.17 is added back to Mr. Olender's income, making a taxable income, without considering—without any losses of any \$12,029, and then to that we would add the capital gain of \$2,016, subtract one-half of the Wilson Avenue loss of \$495.17, making a net gain of \$1,520.83, of which one-half would be taxable, or \$760.42, leaving a total taxable income on this one—these two adjustments as the return was reported—of \$12,789.44, resulting in a tax of \$3,552.49. The tax reported was \$3,054.85, a difference of \$497.64, and there would be no change in the computation of the tax on the return of Betty Olender.

Q. Now, Mr. Drewes' little chart here on the percentage of [1134] gross profit as shown by Mr. Olender's business for the years 1944, 1945 and

(Testimony of Roland Hellman.)

1946. As a matter of accounting experience, isn't there quite frequently a large variation in gross profit in the conduct of a business such as this?

A. Well, it's hard to say. As a general rule business percentages do vary. There is—oh, I wouldn't say just how much they would vary from year to year. There appears to be a variation between 1945 and '46 around 7 per cent. They could vary from five to ten per cent, depending upon, of course, upon the types of merchandise and the saleability and so forth.

Mr. Lewis: No further questions.

Mr. Drewes: No further questions.

(Witness excused.)

Mr. Lewis: Mr. Mytinger.

HUBERT C. MYTINGER

called by the Government, sworn.

The Clerk: Please state your name, your address and your occupation to the Court and to the Jury.

A. Hubert C. Mytinger, technical adviser, Office of Regional Counsel, Penal Division, Bureau of Internal Revenue, San Francisco.

Q. Your address?

A. 100 McAllister Street. [1135]

Cross-Examination

By Mr. Lewis:

Q. Mr. Mytinger, you are also a certified public accountant, are you not? A. I am.

(Testimony of Hubert C. Mytinger.)

Q. Now I refer you to the Government exhibit which you based your calculations on—have you that exhibit?

A. No, I haven't, Mr. Lewis. I believe it is in evidence.

Q. I show you U. S. Exhibit 51. You prepared that exhibit, did you not? A. I did.

Q. Taking up the first item. Assets, cash in store registers, \$2,500, 1944. \$1,000 for the next two succeeding years.

As a certified public accountant, could you certify to that figure?

A. My answer to that would be equally applicable to all of these items, Mr. Lewis. I made no independent verification.

Q. In other words, you never independently verified a single item on the basis of which you based your calculations? A. That is correct.

Q. I show you a book here. Can you identify that book?

A. Yes, that is Volume 1 of the 1946 Prentice Hall Federal Tax Service.

Q. Now I want you to turn to the page that is marked there. [1136] What is that chapter?

A. The chapter is entitled, "Basis for determining gain or loss, depletion and depreciation."

Q. How many pages does that chapter consist of?

Mr. Shelton: Objected to, if your Honor please. This is collateral to the issues in this case, as to how many pages there are in that particular chap-

(Testimony of Hubert C. Mytinger.)

ter. Isn't that the Prentice Hall Service, Mr. Lewis?

Mr. Lewis: Yes. I think it is relevant. They have brought up the point here that Mr. Olender had an intent to evade his income tax by using the wrong basis on the sale of the Riverdale Ranch, and here is an expert. The jury doesn't know whether or not a man should know that or not, and I just want to introduce that book into evidence for the sole purpose of showing that that is a very complex subject. A layman wouldn't necessarily know how to handle it.

Mr. Shelton: Counsel——

The Court: Well, it would not follow, counsel, either logically or otherwise, by reason of the number of pages a man might establish his or her intent. And under the circumstances I sustain the objection. If you desire to inquire of him specifically upon any phase of the matter, you may do so. A complex paragraph in a half a page may be more abstruse than a thousand pages. Isn't that true?

Mr. Lewis: That is correct, your Honor. [1137]

The Court: All right.

Q. (By Mr. Lewis): Will you turn to the paragraph in that book dealing with the basis—the sections in that book dealing with the basis of real estate acquired by inheritance?

A. I believe you mean that portion entitled "Property transmitted at death"?

Q. Yes. Will you read that to the jury?

(Testimony of Hubert C. Mytinger.)

Mr. Shelton: If your Honor please, I object on the ground that that's not the proper way to introduce in evidence what counsel appears to have in mind doing. I mean the question is not on the general subject of the basis of property values per capital gains. But the question, I submit, should properly be tied into this particular problem, and on that ground the Government will object.

Mr. Lewis: Your Honor, I think I asked him the specific question, the basis of property transmitted at death.

The Court: The objection is overruled.

A. Mr. Lewis, which do you want me to read now, the law, the regulations, or the editorial comment?

Q. (By Mr. Lewis): The law and the regulations will be sufficient. The editorial comment is quite extensive.

A. And you want me to read the entire section of the law covering this?

Q. Yes, the statute.

A. The section is known as Section 113A, Internal Revenue [1138] Code. It is entitled subsection 5, "Property transmitted at death."

"If the property was acquired by bequest, devise or inheritance, or by the decedent's estate from the decedent, the basis shall be the fair market value of such property at the time of such acquisition. In the case of property transferred in trust to pay the income for life to or upon the order or direction of the grantor, with the right reserved to the grantor

(Testimony of Hubert C. Mytinger.)

at all times prior to his death to revoke the trust, the basis of such property in the hands of the persons entitled under the terms of the trust instrument to the property after the grantor's death shall, after such death, be the same as if the trust instrument had been a will executed on the day of the grantor's death. For the purpose of this paragraph property passing without full and adequate consideration under a general power of appointment exercised by will shall be deemed to be property passing from the individual exercising such power or by bequest or devise. If the property acquired by bequest, devise, or inheritance, or by the decedent's estate from the decedent, and if the decedent died after August 26, 1937, and if the property consists of stock or securities of a foreign corporation, which with respect to its taxable [1139] year next preceding the date of the decedent's death was, under the law applicable to such a year, a foreign personal holding company, then the basis shall be the fair market value of such property at the time of such acquisition or the basis in the hands of the decedent, whichever is lower. In the case of an election made by the executor under Section 811(j), the time of acquisition of the property shall, for the purpose of this paragraph, be the applicable valuation date of the property prescribed by such section in determining the value of the gross estate."

Mr. Lewis: I think that will be enough. I just wanted to show it is not a simple subject. No further questions.

(Testimony of Hubert C. Mytinger.)

Redirect Examination

By Mr. Drewes:

Q. Mr. Mytinger, you don't have the Government exhibit—what was the number——

Mr. Lewis: 51.

Q. (By Mr. Drewes): You testified with respect to the Government Exhibit No. 51 that you made no verification in connection therewith?

A. I have made no independent verification, that's right.

Q. However, in compiling the Government Exhibit No. 51 you had the benefit of the work done by revenue agent Root and special agent Whiteside, had you not? A. That is true. [1140]

Mr. Drewes: No further questions.

(Witness excused.)

Mr. Lewis: Your Honor, we expect another witness at 11 o'clock. Could we have the recess at this time?

The Court: Yes.

Ladies and gentlemen, we will take the morning recess, and with the same admonition to you not to discuss the case or form an opinion until the whole matter is submitted to you.

(Short recess taken.)

Mr. Hagerty: The defense will call Mr. Lorenzen.

HIRAM A. LORENZEN

recalled by the defendant, sworn.

The Clerk: Please restate your name for the record.

A. Hiram A. Lorenzen.

Direct Examination

By Mr. Hagerty:

Q. Mr. Lorenzen, I show you certain invoices here and ask you if you can identify them?

A. Yes, I can.

Q. What are they?

A. They are invoices that were made for merchandise sold to Mr. Olender.

Q. Are these invoices on the store of Money Back Smith? A. They are. [1141]

Q. You are still employed with that firm today, are you? A. That's right.

Q. And are those invoices the same as your invoices today? A. No, they are not.

Q. In what respect to do they differ?

A. Our firm name has been changed and our system is entirely changed from this.

Q. When did those changes occur?

A. About 19——

Mr. Shelton: Just a minute. Objected to, if your Honor please. This comparison with the system now and then is irrelevant.

Mr. Hagerty: I will withdraw the question, your Honor.

At this time I would offer into evidence these in-

(Testimony of Hiram A. Lorenzen.)

voices which have been shown to the Government counsel.

Mr. Drewes: Mr. Hagerty, I understood that some of those were copies and some duplicates.

Mr. Hagerty: Yes. We have two groups of invoices. The pencil copies are the originals, and the typewritten copies are the duplicates.

Is that true, Mr. Lorenzen?

A. That's right.

Q. Will you explain to the Court why you made duplicates of the originals?

A. Well, it is because Mr. Olender either lost them or didn't [1142] have them and that is after our statement was sent to him, and he asked us to send him duplicate invoices, or he picked them up from us.

Q. And then these records were made under your direction?

A. That's correct.

Q. Is that true?

A. Yes.

Q. From your firm's books?

A. That's right.

Q. And those books are kept in the due course of business, is that true?

A. That's right.

Q. And these are true and accurate records of what they speak for on their face?

A. Yes, they are.

Mr. Drewes: May I ask one question?

Mr. Hagerty: Again I renew the offer.

Mr. Drewes: I would like to ask one question on voir dire before you offer them.

(Testimony of Hiram A. Lorenzen.)

Mr. Hagerty: Yes.

Mr. Drewes: I have examined them briefly, Mr. Lorenzen, and I note that the originals are marked "Paid," whereas the duplicates show the date of payment. That is in some cases. Can you explain?

A. Yes. [1143]

Q. Why is that so?

A. These duplicates were made out after our statement was sent out and he asked for the duplicate bills. So those that were marked "Paid" we marked "Paid" on them and those that were not we left open.

Q. I had particular reference to the date of payment, Mr. Lorenzen.

A. That was the date in our books that the invoices were paid.

Q. Oh, I see. You included on the duplicate, you included the dates?

A. I don't quite understand you.

Q. When you furnished duplicates to Mr. Olender, you included the dates of payment which did not show on the originals?

A. That's right. The originals were not paid for at the time they were made out.

Q. And do you recall approximately when Mr. Olender requested the duplicate invoices?

A. No, I wouldn't know. It would be after the first of the month. After the merchandise was shipped to him. After we had rendered him a statement.

Mr. Drewes: No further questions.

(Testimony of Hiram A. Lorenzen.)

Mr. Hagerty: Again I renew my offer, your Honor, of these exhibits in evidence as the defendant's next in order. [1144]

The Court: They may be marked.

The Clerk: Defendant's Exhibits AM and AM-1 in evidence.

Mr. Hagerty: No further questions of this witness.

Cross-Examination

By Mr. Drewes:

Q. One or two questions, Mr. Lorenzen. Do you know whether these invoices were paid by check or by cash?

A. No, I do not. I don't remember that.

Q. Will your books reflect——

A. If I had——

Q. ——for the period in question whether or not——

A. If I had those books, they would. But we have destroyed all those old books over five years old.

Q. You are unable to produce them for that reason?

A. I haven't been able to find them, no.

Mr. Drewes: Your Honor, may we examine those for just a moment?

The Court: I will reserve my ruling until you have completed your examination. I thought you had examined them.

(Testimony of Hiram A. Lorenzen.)

Mr. Drewes: Very briefly.

Mr. Hagerty: I might say, your Honor, that the defendant spent the week end searching for records in response to the question of either your Honor or the Government counsel and that is why these are here. [1145]

The Court: I notice they have a numbering machine stamp on them showing that at one time or another they were numbered, apparently in sequence by numbering machine, and some of them have, at least 1739, 1740, and the like——

Mr. Hagerty: Yes. Maybe Mr. Lorenzen can tell us about the numbering method of those invoices.

A. We had several pads that we would number in advance and we numbered the full pad.

Mr. Hagerty: Does your firm still use that type of invoices? A. No, we do not.

Mr. Hagerty: The name is different, is that true? A. That's correct.

Q. (By Mr. Drewes): One or two further questions, Mr. Lorenzen. And I simply want to be sure I understood your testimony. The originals, in some cases, are not marked with the date of payment?

A. No, they were not paid. I don't think you find any of the originals with the mark of payment on them, do you?

Q. Well, possibly you better examine them and explain for us, Mr. Lorenzen, so there is no misunderstanding here. (Handing to witness.)

(Testimony of Hiram A. Lorenzen.)

A. Are these the originals?

Q. Here is—in light red pencil here is the mark, the letters “PD” and the date. [1146]

A. He most likely brought this invoice over with him to the store and when the girl checked it, it was marked “paid.”

Q. Mr. Olender brought that over?

A. Yes.

Q. And it is your understanding that that is his notation?

A. No, I think this is the girl’s notation, if I am not mistaken. It could be his, but I wouldn’t say. But it looks like hers.

Q. Now here is a duplicate invoice which is marked “paid 2/14/44,” and your original has no mark of payment on it at all?

A. No. Well, this was sent with the merchandise to him. He most likely came back and asked for these, a copy of these invoices, and we gave it to him and those that were marked—those that had been paid we marked them paid.

Q. I see. And to the best of your recollection how long after the purchases were made did he request duplicate copies?

A. Oh, I would say a month or two after that.

Mr. Drewes: I have no further questions.

Mr. Hagerty: We have no further questions. Thank you, Mr. Lorenzen.

The Court: They may be marked.

The Clerk: Defendant’s Exhibits AM and AM-1 in evidence.

(Thereupon the invoices of Money Back Smith were marked [1147] Defendant's Exhibits AM and AM-1 in evidence.)

(Witness excused.)

Mr. Lewis: Your Honor, we still have the problem of Mr. Lerman, and I have been trying to get a hold of him to see if he will come over, but by stipulation, if we have to take his deposition, we will take it tomorrow morning, but the Government can proceed with their case at the present time.

Mr. Drewes: If your Honor please, at this time the Government has one or two motions which it would like to address to the Court. However, there are other problems concerning other evidentiary problems that we would also like to discuss with the Court, which I had planned on doing at the noon recess, and I wonder if we might reserve our motions until that time in the interests of expediting the trial.

The Court: All motions are reserved. We might take our adjournment a little earlier, say a quarter to 12, and I will discuss with you the matters at hand, whatever they are.

Mr. Drewes: Very well.

The Court: How long will they take, 15 or 20 minutes?

Mr. Drewes: 15 or 20 minutes. We have a matter of the introduction of evidence of a rather complicated nature that I would like to discuss with the Court.

Mr. Shelton: Mr. Whiteside will you take the stand, [1148] please?

MELBOURNE C. WHITESIDE

called by the Government, sworn.

The Clerk: Please state your name, your address and your occupation to the Court and to the Jury.

A. Melbourne C. Whiteside. I am a special agent in the Intelligence Division of the Bureau of Internal Revenue.

Q. Your address?

A. 32 Lindbergh Street, San Mateo, California.

Direct Examination

By Mr. Shelton:

Q. Mr. Whiteside, you have previously stated that you were the special agent who was in charge of this investigation by the Bureau?

A. Yes, sir.

Q. You will recall that a few days back that His Honor expressed an interest in some information with respect to purchases based on the sailor suits purchased by the defendant during the years 1944, '45 and '46.

A. Yes, that's correct.

Q. And was it last Monday that the Government agents, together with Mr. Hellman, came in here and did some work on the purchase records in the form of invoices produced by the defendant?

A. Yes, sir, that's correct. [1149]

(Testimony of Melbourne C. Whiteside.)

Q. Do you have there some work sheets which summarizes the work done at that time?

A. Yes, these are carbons. At the time Mr. Hellman brought in the purchase invoices I went through each invoice, picked out those which indicated purchase of sailor suits, called them off to Mr. Hellman, and he made a tabulation, and a carbon copy was made which was given to me.

Q. Do I understand that those working papers are in Mr. Hellman's writing?

A. That is correct.

Q. Will you please tell the Court and the ladies and gentlemen of the jury what that summary shows with respect to sailor suit purchases with respect to the year 1944, that is, sailor suit purchases by the Army & Navy Store?

Mr. Hagerty: Well, just a minute. I will object to that question and ask that the examination proceed in the normal manner and that he should be directly questioned and make an answer rather than testifying from some exhibit that we haven't seen.

The Court: Well, you might glance at it. This is just to facilitate the examination. That is a summary, is it?

A. Yes, sir, they have the original. This is a copy.

Mr. Shelton: Your Honor, may the witness answer the question?

The Court: Answer the question, please. [1150]

(Testimony of Melbourne C. Whiteside.)

A. For the year 1944 we found that Mr. Olender had purchased 259 suits at a cost of \$6,713.50. Those, of course, did not include the \$20,550 Goodman——

The Court: 1944, 259 at the cost of——

A. \$6,713.50.

The Court: And the average price?

A. The price is, for the most part, appears to be about \$26.50. We did not work out an average.

Q. (By Mr. Shelton): Mr. Whiteside, in connection with this Schedule that has been prepared, I understand that it was prepared from such records as were brought in by the defendant and that you had no opportunity to make any independent search as to whether those records were complete? A. No, we accepted——

Mr. Hagerty: If your Honor please, this is leading and suggestive. I think it is an extemporaneous statement to the jury by the counsel. I am going to object to that. I will withdraw my prior objection as to the statement that I didn't know about this. But statements that are really declaratory, like this, like the one just made by Mr. Shelton, I am going to object to, though, that form of interrogation.

The Court: It is objectionable on that basis.

Mr. Shelton: All right.

Q. Mr. Whiteside, from what invoices was that schedule prepared? [1151]

(Testimony of Melbourne C. Whiteside.)

A. It was prepared from invoices which were produced by Mr. Hellman.

Q. And will you state whether or not you went over to the defendant's place of business to make any check as to whether all invoices were produced?

A. No, I did not go to his place of business—that is, this past week.

Q. Will you state whether or not you accepted for the purpose of this schedule such invoices as were produced here at the Court chambers by Mr. Hellman? A. That is correct.

Q. All right. Then for the year 1945, Mr. Whiteside, according to the working papers there, how many sailor suits were purchased by the Army & Navy Store?

A. In the year 1945 there were 1,578 suits purchased at a total cost of \$35,656.

Q. Will you give the comparable figures for the year 1946 from the schedule?

A. The year 1946 he purchased 385 suits at a total cost of \$9,452.

Q. Mr. Whiteside, will you state whether any check was made to determine whether these particular invoices went into the record of the defendant's books? Was any such check made by you or did you just analyze the invoices as produced?

A. I did not check these, each item, back to the books. [1152] There were certain ones we did look at and they were recorded.

Q. The ones which you checked were recorded?

A. That's correct.

(Testimony of Melbourne C. Whiteside.)

Q. Mr. Whiteside, did you make any attempt to determine from the invoices produced the sizes of sailor suits purchased by the Army & Navy Store during the years 1944 to 1946?

A. The invoices did not show sizes. There may be one exception. I notice on March the 8th, 1946, Dewey Sales showed—we have the figures thirty 37's, thirty-five 38's, twenty 39's, fifteen 40's. I presume those would be the sizes shown on the invoices.

Q. Aside from that one invoice, Mr. Whiteside, was there any indication on any of the sailor suit invoices as to the sizes of the suits?

A. No, sir, there was not.

Q. Now, Mr. Whiteside, during your investigation I will ask you whether or not aside from the Lerman suits, the invoices for which are in this record, you were able to determine the sizes of any of the sailor suits purchased by the Army & Navy Store or Milton Olender during the years 1944 to 1946, inclusive?

Mr. Hagerty: Object to the question as being leading and suggestive.

The Court: Overruled.

A. No, we could find no such records.

Q. Will you state whether or not, to the extent available, [1153] you did examine the records of persons selling sailor suits to Olender during those years, and persons to whom Olender sold sailor suits during those years?

A. During the year 1944 the majority of these

(Testimony of Melbourne C. Whiteside.)

suits were purchased by Mr. Olender from Dorfman Hat. We attempted to get a record from Dorfman Hat Company as to sizes. They had no such record.

We also checked the Goodman records and we could find no record of sizes.

Q. Mr. Whiteside, can you tell me the approximate month when you checked those Dorfman records to see if you could determine sizes?

A. It would have been in the early part of the investigation. I would offhand say it would have been in October or the early part of November, 1948.

Q. And approximately what month did you make the attempt to determine the sizes of sailor suits purchased from George Goodman?

A. That would have been recently—prior to the time the trial started.

Q. Mr. Whiteside, there has been some testimony in this trial about purchases of sailor suits by the Army & Navy Store or Olender which did not go into the books. I will ask you whether in checking these invoices that were produced here in Court, so far as your check went, you found any of [1154] those invoices that were not recorded in the defendant's books?

A. Are you referring to the \$20,550—

Q. Those or any other purchases that may have been made outside the books, Mr. Whiteside?

A. No, I don't recall finding the others.

(Testimony of Melbourne C. Whiteside.)

Q. Mr. Whiteside, during the course of your investigation did Mr. Olender at any time give you any invoices evidencing the purchase by him of sailor suits? A. No, sir.

Q. Mr. Whiteside, I will show you the last page here of Government's Exhibit No. 25 for identification, which relates to six items, and the heading on that schedule is the following: "Withdrawals from savings account in Fresno."

Now I believe that it is established in this record that this schedule was part of the work done by the accountant Ringo for the taxpayer.

A. That is correct.

Q. I will ask you whether or not this schedule which I show you was a part of a sworn statement of assets and liabilities which was submitted by the defendant to the Bureau of Internal Revenue during the course of your investigation?

A. It was submitted to Mr. Root just prior to the time I came into the investigation.

Mr. Hagerty: Objected to as hearsay, your Honor.

The Court: Overruled. [1155]

Q. (By Mr. Shelton): Mr. Whiteside, I will ask you whether or not you made a check or verification as to many of the items contained in what is now Government's Exhibit 25 for identification?

A. I did, yes.

Q. With specific reference to the six items that I have referred to before on the last page of this

(Testimony of Melbourne C. Whiteside.)

schedule, I will ask you what, if anything, you did in an effort to check or verify those items?

A. Well, our first step was to go to the bank in Fresno.

Q. Which bank was that?

A. The Bank of America. And locate the account of Mrs. Olender—I think the account was number 3941.

Q. Was that Mrs. Mollie Olender, Mr. Whiteside? A. Mrs. Mollie Olender, yes.

Q. What relation was she to the defendant?

A. The defendant's mother.

Q. After you located that account, Mr. Whiteside, what did you do?

A. Well, we went through all the withdrawal slips to try and trace the funds from the withdrawals as shown on that—in that schedule, to see whether or not the money left the bank and was in fact transmitted to the defendant, and we found that most of them were transferred to other [1156] accounts.

Q. Well, without telling what most of them—Mr. Whiteside, let's see if we can take them item by item. There are six of these are there not?

A. That's correct.

Q. All right. Can we take the first item under date of February 3, 1942, in the amount of \$1,000, did you attempt to verify what happened to that money? A. Yes, sir, I did.

(Testimony of Melbourne C. Whiteside.)

Q. What did your investigation show happened to it?

A. It went in one of the other accounts. I would have to refer to the Exhibit to give you the correct—Do you have the Fresno Exhibits from the bank account?

Q. All right. Showing you now, Mr. Whiteside, Government's Exhibit number 52, which is records produced by the Bank of America, Fresno, and Government Exhibit 53, which is records produced by the Security First National Bank of Los Angeles, Fresno branch. I will ask you what your investigation showed as to the disposition of the \$1,000 item on February 3, 1942.

Mr. Hagerty: Well, if your Honor please, I will object on the grounds, just in the interests of time, the record speaks for itself. We have the testimony of the bank men here as to these transactions.

The Court: Overruled.

A. What was the first date you gave me, Mr. Shelton? [1157]

Q. (By Mr. Shelton): February 3, 1942.

A. That was deposited into another savings account, withdrawn and deposited in savings account number 2146. That was in the name of Mrs. J. Olender. [1157A]

Q. I will ask you what other name Mrs. Mollie Olender used? A. Mrs. J.—Julius Olender.

Q. I will ask you whether or not the bank rec-

(Testimony of Melbourne C. Whiteside.)

ords show that the transfer in question was made directly from the one account to the other.

A. Yes, sir, it does.

Q. I will now ask you, Mr. Whiteside, about the second item which is March 31, 1943, in the amount of \$1,000, and ask you what your investigation showed as to that item?

A. That was deposited into the commercial account of Mrs. J. Olender on March 31. It was a transfer between the accounts.

Q. I will ask you, in the third place, concerning an item on January 6, 1944, in the amount of \$2,000?

A. On January 6, 1944, there is a transfer from Mrs. Mollie Olender's account to the account of Terrys, Olender, Gambor. That is number 126. It was again a transfer between accounts.

Q. And Mrs. Gambor is the sister of the defendant? A. That is correct.

Q. I will ask you about an item of \$2,500 on July 5, 1944.

A. That was a withdrawal from the Security First National Bank, Fresno branch, revenue agent Root and I called at that bank and they could not locate the withdrawal slip for that. [1158]

Q. Well, now, will you state from what account the \$2,500 was originally drawn, that is the account in whose name?

A. That was the account in the name of Molly Olender, the account number 59810.

Q. You could not determine then where that money went? A. No, sir.

(Testimony of Melbourne C. Whiteside.)

Q. I will ask you next about an item of \$1,000 under date of December 15, 1944.

A. On December 15, 1944, there was a transfer from the savings account 3941 to Mrs. J. Olender's commercial account.

Q. I will ask you finally, Mr. Whiteside, about an item of \$3,000 under date of January 2, 1945?

A. That was a transfer to the account number 126 in the name of Terrys, Olender, Gambor.

Q. All right. Now, Mr. Whiteside, summarizing these six accounts I will ask you whether or not all of the six withdrawals were made from one account or another account in the name of the taxpayer's mother, Mrs. Mollie Olender or Mrs. Julius Olender?

A. That is correct.

Q. Of the five transfers that can be accounted for, I will ask you how many of those five were to accounts of Mrs. Mollie Olender? [1159]

A. Three of them.

Q. And to whom were the other two transfers, to what accounts?

A. To Terrys, Olender, Gambor.

Q. And in summary of the five transfers you were able to trace, three went to the accounts of Mrs. Mollie Olender and two went to the accounts——

Mr. Hagerty: If your Honor please, I am going to object to the declarations by the counsel when he is interrogating a witness.

The Court: You will have to ask the witness.

(Testimony of Melbourne C. Whiteside.)

Mr. Hagerty: He is summarizing testimony. It is too early for argument.

Mr. Shelton: It is a summary.

The Court: You might ask the witness the summary.

Mr. Shelton: Well, in summary then, Mr. Whiteside, to what accounts did the five accounts go?

A. Well, three went to accounts of Mrs. Olender, one of them—which was the same account, two in her commercial account. The other two, which were traced, went to the account of his sister.

Q. Mr. Whiteside, I will show you Defendant's Exhibit AC, which is a ledger account of the bank account—ledger record of the bank account of Olender, and Defendant's Exhibit AE, which is a series of checks drawn on the same bank account of Milton Olender, a personal bank account. [1160] I will ask you whether or not after those two Exhibits were introduced in evidence you made a tabulation to determine on the basis of the ledger account how many of the personal checks of the defendant in the years 1944 and '45 were not produced here in court?

A. There were 14 of the 1944 checks and three of the 1945 checks not produced or not included in this pile.

Q. Now I will ask you whether or not during the course of your investigation, Mr. Whiteside, you made an attempt to obtain the personal checks of the defendant for the years 1944 and 45?

(Testimony of Melbourne C. Whiteside.)

A. Yes, we made repeated requests through Mr. Ringo.

Q. And I will ask you to what extent you were shown during the investigation checks for the years 1944, 1945, which are now part of that Exhibit before you?

A. Well, there are a few, very few checks which Mr. Ringo obtained from Mr. Olender, some of the larger checks with which he bought stock or paid his insurance premiums, I believe is one of them, some bonds. The checks relating to mostly the personal items, expenditures for personal items, were not produced. We have no records of those at all.

Q. Mr. Whiteside, there has been some testimony in this record with respect to \$5,000 worth of sailor suits purchased from one Levy by one Lerman. I will ask you whether or not during the course of your investigation you [1161] gave attention to that purchase? A. Yes, we did.

Q. I will ask you whether or not during the course of your investigation you had access to original photostatic copies of nine cashier's checks in the amount of \$20,550 paid by the defendant to George Goodman? A. Yes, we have them.

The Court: Counsel, before we take up that item, and particularly in reference to the checks we might address ourselves to the suggestion made by your co-counsel.

Mr. Shelton: Yes, your Honor.

(Testimony of Melbourne C. Whiteside.)

The Court: Recess the jury until two o'clock this afternoon, with the same admonition not to discuss the case and form an opinion.

(Thereupon out of the presence of the jury, motion to strike by the Government, those items contained on defendant's schedule 4: 1944 transfers to personal bank account \$100, \$400, \$1,500; transfer to personal bank account \$300; transfer to Olender-Elkus account \$1,500; 1945, June 9, transfer to personal bank account, \$500; \$522; November, 1945, four items totaling \$2,500; 1946, May 1st, transfer to personal account \$6,000; Olender McGrete account \$5,000; Olender-Elkus bank account \$1,700, and all other items down to December 20, \$1,500, with the exception of \$1,000 to W. and J. Sloane. Motion to strike denied.)

(Adjournment taken until two o'clock [1162] p.m.)

Monday, October 6, 1952, 2:00 P.M.

MELBOURNE C. WHITESIDE

resumed the stand, having been previously sworn, was examined and testified further as follows:

Direct Examination
(Resumed)

By Mr. Shelton:

Q. Mr. Whiteside, just before the recess I had invited your attention to nine cashier's checks to George Goodman in the amount of \$20,550 purchased in June, 1944, and to \$5,000 in sailor suits purchased by Morris Lerman in 1945—I believe about the month of June. Now in the course of your investigation will you state whether or not you made any effort to determine whether there was any tie-in between the \$20,550 of cashier's checks and the \$5,000 Lerman purchase?

A. Yes, we made that—I made an attempt to determine that.

Q. And by "we" will you state whether or not you mean yourself and revenue agent Root?

A. That is correct.

Q. Will you tell the court and the jury the results of your efforts to determine whether there was any tie-in between the \$20,550 of cashier's checks and the \$5,000 Lerman purchase in the next year?

Mr. Hagerty: If your Honor please, I will ob-

(Testimony of Melbourne C. Whiteside.)

ject to the question as calling for the conclusion and opinion of [1163] this witness and attempting to usurp the function of the jury. He can ask him what he found and what he did, but to put a conclusion in the evidence like that I think surely invades the province of the jury.

Mr. Shelton: It was a double question in the form of whether or not.

The Court: Well, these men are called as experts and as such they can give their opinions based upon the evidence. As I indicated to the jury at the outset of the case, whether a man be called as a Government witness or as a defense witness, his testimony is to be viewed in the same light, with the same test of credibility, and the fact that a man may be called as a Government witness is not to receive any greater consideration at your hands or any less. They are all equals in the eyes of the jury and in the eyes of the Court. Being experts on any subject, there is an exception to the time-worn rule. The exception is that an expert may give his conclusions based upon the evidence and the facts as he views them. Now the other side may express their conclusions the same way.

Accordingly the objection is overruled.

A. We were unable to find any evidence whatsoever to indicate that these suits sold in 1945 had any bearing on the purchase in 1944, that is, the Goodman suits. [1164]

Q. (By Mr. Shelton): Mr. Whiteside, before

(Testimony of Melbourne C. Whiteside.)

the recess you gave some testimony with respect to some purchase schedules which were prepared by you and Mr. Root and Mr. Hellman, did you not?

A. That is correct, yes.

Q. I will ask you again to refer to the 1945 schedule, Mr. Whiteside, and to state how many sailor suits were purchased by Milton Olender in the first six months of 1945, according to the information contained in that schedule?

A. In the first six months there were only 22 suits purchased.

Q. I will also ask you to read the purchases in the last six months of the year according to that schedule?

A. On July 31, Mr. Olender purchased from M. Saraga 951 suits at \$25, total amount \$23,775.

On August 28th he purchased 500 suits from Sea-going Uniform Company at \$18 per suit for a total amount of \$9,000.

On November 6th he purchased 105 suits from Joe Asman at \$22 per suit, totaling \$2,310.

Mr. Shelton: The Government will, at this time, offer in evidence as its Exhibit next in order a schedule of sailor suit purchases for the years 1944, '45, '46 in the handwriting of Mr. Hellman. [1165]

The Court: It may be marked.

The Clerk: U. S. Exhibit Number 54 in evidence.

(Thereupon handwritten schedule relative to purchase of sailor suits received in evidence and marked U. S. Exhibit 54 in evidence.)

(Testimony of Melbourne C. Whiteside.)

Q. By Mr. Shelton): Mr. Whiteside, before the recess I had asked you concerning those six items relating to withdrawals from Mrs. Mollie Olender's bank account in Fresno. I will ask you whether or not in connection with the five transfers you are able to trace you looked at the transferee accounts to see whether there were withdrawals from those accounts through the close of the year 1946?

A. Yes, we check that. [1166]

Q. And what did you find with respect to those five transfer accounts as to whether there had been withdrawals between the times the money passed to the transfer accounts and the end of the calendar year, 1946?

Mr. Hagerty: If your Honor please, I will object to this as not being the best evidence. The matter is of record.

The Court: Overruled. You can state your summation from the record.

Mr. Shelton: And may the record show that he has Exhibits 52 and 53 to testify from, that is Government Exhibits.

A. The money which was transferred into the account of Terrys, Olender, Gambor, savings account number 126, remained in that account. There was no withdrawal at all at any time. In fact the money is still there.

On account number 2146, in the name of Mrs. J. Olender, which received one of the transfers in the amount of \$1,000, there are some small withdrawals

(Testimony of Melbourne C. Whiteside.)

but none in the amount of \$1,000 for a period of approximately two months later. Later there is a \$1,000 withdrawal.

In the commercial account there are no amounts which could be—no similar amounts which could be deemed to have been a transfer out of the [1167] account.

Q. Now, Mr. Whiteside, in connection with these six items that I questioned you about, that is, the withdrawals from this Fresno bank account of Mrs. Mollie Olender, in checking on the schedule on the last page of Exhibit 25 for identification, will you state whether you did anything else except checking the bank records? A. Yes, we did.

Q. Will you state whether or not you discussed with anyone this matter? A. Yes.

Q. With whom did you discuss this matter?

A. With Mrs. Mollie Olender.

Q. And about what month was that discussion held?

A. We talked to her on two occasions, on November 17 and November 18, 1948.

Q. Now, Mr. Whiteside, as a result of your checking the bank records in Fresno here in evidence and as a result of your discussions with Mrs. Mollie Olender, I will ask you whether or not, for the purposes of your report, you made a determination as to whether the six items represent gifts which were made by Milton Olender—strike that—which were made by Mrs. Mollie Olender to her son Milton?

(Testimony of Melbourne C. Whiteside.)

Mr. Hagerty: Well, if your Honor please, again we will enter an objection. The question is both leading and [1168] suggestive. It also is again calling for the conclusion and opinion of the witness, and partially based on hearsay.

The Court: Overruled.

A. Yes, we made a determination on that.

Q. (By Mr. Shelton): What was that determination?

Mr. Hagerty: We enter the same objection, your Honor.

The Court: Overruled.

A. Our determination was that the gifts were not in fact made.

Mr. Shelton: You may examine.

Cross-Examination

By Mr. Lewis:

Q. Mr. Whiteside, relative to the last question asked you by Mr. Shelton, did you not procure an affidavit from Mollie Olender?

A. No, sir.

Q. Did you, Mr. Root and Mr. Hellman examine all the invoices for 1944 and check them all against the purchase register?

A. The 1944—yes, sir, we went through that entire year.

Q. How many did you find missing?

A. I don't recall the actual count. They were substantially correct.

(Testimony of Melbourne C. Whiteside.)

Q. Did you make the same check for the years 1944 and 1946? [1169] A. No, sir.

Q. Why?

A. It was a matter of time, Mr. Lewis.

Q. Didn't you state at that time that inasmuch as 1944 was proved correct it was deemed unnecessary to verify 1945 and 1946?

A. That was one of the factors considered. The main factor, I would say, was the time of day. It would have taken several more hours to check those out.

Q. In any event did you find any invoices missing pertaining to sailor suits for the years 1945 and 1946?

A. I wouldn't know if they were missing. I wouldn't know what they pertained to.

Q. Mr. Whiteside, I show you U. S. Exhibit 25 for identification, U. S. Exhibit number 26 and U. S. Exhibit number 45. In the course of your investigation did you check the U. S. Exhibit number 25 for accuracy? A. Yes, sir.

Q. Did you check the item on that Exhibit number 3, page 1, personal check 5/10/45 to J. C. Penney Company?

A. What page is that, Mr. Lewis?

Q. It is on page 1, Exhibit 3 of that.

A. Yes, I believe that is one of the checks that Mr. Ringo produced, the thousand dollar check to J. C. Penney Company.

Q. Well, doesn't that show that that was a per-

(Testimony of Melbourne C. Whiteside.)

sonal check [1170] on Exhibit 3, page 1, for the purpose of purchasing the bonds listed 1956 to 1959?

A. Yes, that is what it states.

Q. I hand you herewith CCH, Commerce Clearing House, about Government bonds, page 2133. You are familiar with that volume, aren't you?

A. I am familiar with the service. I don't know if I have looked at this particular page.

Q. What is the date that they were issued?

A. It shows the date issued February 1, 1944.

Q. Then did you rely on schedule three in making up your figures for the net worth computation?

A. No, sir, in checking these bond purchases we found that he had offered the wrong explanation as to how they were acquired. The bonds, I believe, were acquired—were on hand but not acquired as he explained them.

Q. Now directing your attention to Exhibit 26 there. The dates alleged therein to be the dates of the Goodman purchases. Are all of those dates after May 5, 1944?

A. On Exhibit 26?

Q. Yes, the dates of the deliveries of the Goodman purchases?

A. I see no dates of delivery on this one, sir.

Q. Maybe this other Exhibit. Yes. It's Exhibit 45—goods received as follows— [1171]

Mr. Drewes: I will object to that question, your Honor. That Exhibit was put into evidence with respect to item number 19 only.

(Testimony of Melbourne C. Whiteside.)

The Court: What is the precise question?

Mr. Lewis: I was asking him to identify the dates of the deliveries of the Goodman purchases appearing on the Government Exhibit. They put it in for number 19. I may put it in for something else if he answers the question.

Mr. Drewes: I don't believe the witness testified that the document was made——

The Court: You may examine him.

Q. (By Mr. Lewis): What is that document?

A. This is a photostat of one of the pages of Mr. Ringo's work papers.

Q. You procured those from Mr. Ringo?

A. That is correct.

Q. In the course of your investigation?

A. Yes.

Q. Directing your attention to the dates of the deliveries, Goodman purchases. Who furnished those figures there to Mr. Ringo, the dates?

Mr. Shelton: Objected to, if your Honor please, on the grounds it calls for hearsay, not within the knowledge of this witness. [1172]

The Court: Well, if he hasn't any knowledge, he may testify. I can't anticipate.

A. I would have to presume that Mr. Ringo got them from Mr. Olender.

Q. (By Mr. Lewis): Did he not get them from Mr. Root? A. Not to my knowledge.

Q. All right. Take Exhibit 45. Directing your attention to the first line, cash in vaults. Read the year and balances there.

(Testimony of Melbourne C. Whiteside.)

A. What Exhibit, Mr. Lewis?

Q. '45.

A. That doesn't appear in Exhibit 45.

Mr. Drewes: Comparative balance sheet.

Mr. Lewis: Comparative balance sheet.

A. Exhibit 26.

Q. Exhibit 26.

Mr. Drewes: That is the one you referred to?

Mr. Lewis: Yes. No, Exhibit 45. The very item is right here.

A. Those are the decreases in the cash in vault items.

Mr. Lewis: Yes.

A. Is that what you want?

Q. Yes. And those are the figures that you used in making up your net worth computations?

A. That is correct. [1173]

Q. And is Exhibit 45 based upon your Exhibit 26, item 19, cash in vault?

Mr. Shelton: If your Honor please, those were separate exhibits from the work papers of the witness Ringo and I don't believe it is proper to ask this witness whether 45 derives from 26. They are Ringo's work papers and he was on the stand.

The Court: These are the work papers wherein Mr. Ringo has written in his own hand certain legends?

A. Yes.

The Court: I think the observation is correct.

(Testimony of Melbourne C. Whiteside.)

You are asking this man to interpret Mr. Ringo's work.

Mr. Lewis: No. I am asking him—what I intend to ask him is what he based his net worth computations on.

The Court: What Mr. Ringo did?

Mr. Lewis: What Mr. Whiteside did.

The Court: Oh, he may testify to that. Certainly. If this witness resorted, as he apparently did, to any of the work papers of Mr. Ringo, then he may testify as to the precise form and the nature of the foundation.

A. Well, our starting point on net worth of course, was the sworn net worth statements submitted by Mr. Olender. As a breakdown of the cash in vault, we used the information we obtained from Mr. Ringo. [1174]

The Court: What was the amount of that information?

A. Well, it showed disposition of the cash in vault, and Mr. Ringo had advised us that that was information supplied by Mr. Olender, and showed a decrease in 1943 of \$6,000, a decrease in 1944 of \$19,000, a decrease in 1945 of \$42,800, and a decrease in 1946 of \$7,200.

Q. (By Mr. Lewis): You knew during the course of your investigation of the defendant here that the cash that is in dispute here was held by the defendant in the safe deposit box and not in the vault and only during the time that the money

(Testimony of Melbourne C. Whiteside.)

was held by the defendant's father the money was in the vault, didn't you?

A. That's correct. It was in the safe deposit box during the years under investigation.

Q. And look at U. S. Exhibit 45 and U. S. Exhibit 26 and tell me whether or not these Exhibits don't even purport to reflect the disposition of defendant's cash in safe deposit box as distinguished from the original \$75,000 in the defendant's father's vault.

Mr. Shelton: If your Honor please, the Government will object to that as misleading; for this reason, the Government has in evidence as its Exhibit 24 the defendant's own sworn statement of cash as of December 31, 1941, and December 31, 1947. Now at the time those net worth statements were submitted to the Government they were sworn to as true, [1175] and the four diminutions of \$6,000, 19,000, 42,800, and \$7,200 account for the full difference, and for that reason the Government—the difference between \$75,000 and 0 on the taxpayer's own sworn net worth, for that reason the Government submits the question by Mr. Lewis is misleading.

The Court: You might revamp it, Mr. Lewis.

Q. (By Mr. Lewis): Well, calling attention to those two exhibits, Mr. Whiteside, Exhibit 26, item 19 of U. S. Exhibit 45, did you verify—you are a licensed public accountant. Did you verify that \$6,000 cash was used in 1943, \$19,000 in 1944, \$25,000 in 1945, and \$4,800 in 1946?

(Testimony of Melbourne C. Whiteside.)

Mr. Shelton: Mr. Lewis, those last two figures are wrong. Shouldn't the 1945 figure be \$42,800 and the 1946 figure \$7,200?

Mr. Lewis: I'll have to look at the exhibit. I am asking this from memory.

Mr. Shelton: All right.

Mr. Lewis: Yes. \$6,000 in 1943 decrease, \$19,000 in 1944, \$42,800 in 1945, and \$7,200 in 1946.

A. The only verification which was made was through Mr. Ringo, and the disposition of the cash as obtained from him. There was no other written record which we could locate.

Q. As a public accountant would you accept the purported [1176] disposition on its face and not take into account any additions to the funds, such as gifts, rental properties and so forth?

Mr. Shelton: If your Honor please, I will object to that question, on this ground, there is a difference between the ordinary type of thing which is acceptable and an—a legal admission against interest. Now the Government's position in this case is that the taxpayer's own admissions are these figures, being admissions against interest, are binding on him, and for that reason the question of public accounting practice is misleading in these premises.

Mr. Lewis: Will you read the question?

(Question read back by reporter.)

The Court: It might be confusing as phrased. I see the point of your question, but—

You understand that, do you?

(Testimony of Melbourne C. Whiteside.)

A. I believe.

The Court: All right. You may answer it then.

A. No, as a public accountant I wouldn't accept things of that sort.

Q. (By Mr. Lewis): Now, you have been in charge of this investigation since you first became affiliated with Mr. Root? In other words, under the Government procedure the special agent is actually the directing head of the investigation, isn't he?

A. That's correct. [1177]

Q. Did you at any time give an official notice before the bringing of this indictment of Mr. Olender as to what the Government claimed against him?

Mr. Shelton: Objected to, if your Honor please, on the ground that the question again is misleading. Before this case was submitted to a grand jury Mr. Lewis had the opportunity of a conference in the Bureau of Internal Revenue to discuss the matter of a recommendation for prosecution, and the Government will submit that the question of whether Mr. Whiteside notified Mr. Olender of the findings in the case is misleading and improper.

The Court: If it goes to administrative functions and whether or not there is an obligation on the part of Mr. Whiteside and the like, I will sustain the objection.

Q. (By Mr. Lewis): Did your office issue the ninety-day letter with the official determination?

Mr. Shelton: Objected to, because the 90-day

(Testimony of Melbourne C. Whiteside.)

letter was issued after the indictment was brought in this case and has no materiality on the issues of this trial, which are the criminal issues, and not the civil issues.

The Court: Sustained.

Q. (By Mr. Lewis): Were you familiar with the handwriting of Mrs. Mollie Olender?

A. No. I may have seen it once or twice but I couldn't say I am familiar with it. [1178]

Q. Didn't Mrs. Olender tell you during the course of your investigation that \$20,000 worth of bonds belonged to her?

A. I don't believe we asked her that question. I don't recall.

Q. You did not ask her that question. That is one of the largest items in this case.

A. I don't recall that particular point, Mr. Lewis.

Q. You can't remember asking her that question? Here, according to your own figures, you come out with \$73,000 of unreported—what you claimed to be unreported income, and during the course of your investigation you didn't ask Mrs. Olender about the \$20,000 worth of bonds?

A. I say we may have asked her. I don't recall at this time.

Q. Have you ever seen the handwriting of Mrs. Olender, Mrs. Mollie Olender?

A. I think I have seen her signature but that is about all.

(Testimony of Melbourne C. Whiteside.)

Q. Have you examined all the records in the bank concerning Mrs. Olender? Didn't you?

A. Yes, sir.

Q. Are you able to identify her handwriting?

A. No, sir, not just from a signature card. That would be the only handwriting in the bank. [1179]

Q. Would it refresh your memory concerning the questions about the \$20,000 bonds if on the date right after you interviewed her she stated—

Mr. Shelton: Mr. Lewis, can you fix the interview a little more definitely? It is indefinite, I think.

Mr. Lewis: He knows the date that he was down there.

Mr. Shelton: He interviewed her twice, as I recall his direct testimony. Do you mean the first or the second interview?

Mr. Lewis: Either of the interviews.

Q. That she wrote to Mr. Olender and explained you had asked about the bonds, either you or Mr. Root?

Mr. Shelton: Objected to, if your Honor please. This is an attempt to introduce a hearsay matter to refresh recollection on something which is not shown to have been brought to the attention of this witness.

Mr. Lewis: Your Honor, I think here we have a trained investigator of the United States Government. He has been in the service quite some number of years, and I think I have got a right to find out from this witness whether or not he did

(Testimony of Melbourne C. Whiteside.)

ask her about those bonds and try to refresh his recollection because it is inconceivable to me that he wouldn't have asked a woman what he had right on these Exhibits——

The Court: Counsel, the sum of what you've said might [1180] well be reserved to an argument hereafter, and you don't want to make all your arguments at once. But I think it is a pertinent question as to what this gentleman asked any particular witness about any particular item. I will overrule the objection. If he has any recollection, if he has any memory or the like, he may answer.

A. What was the question, Mr. Lewis?

Q. (By Mr. Lewis): Did you or did you not talk to Mrs. Mollie Olender about those \$20,000 bonds?

A. Well, my answer that I gave you a few minutes ago, I stated I did not recall talking to her about those particular bonds. I may have. We talked to her two evenings and we covered many subjects.

Q. But you don't remember the biggest single item in which she was involved?

A. The biggest single item was at that time these alleged gifts.

Mr. Lewis: You may have the witness.

(Testimony of Melbourne C. Whiteside.)

Redirect Examination

By Mr. Shelton:

Q. Mr. Whiteside, Mr. Lewis asked you on cross-examination whether you had made an examination of the correctness of Government's Exhibit number 25 for identification, did he not?

A. That is correct.

Q. In that connection I will ask you whether or not you [1181] made a determination that Mrs. Betty Olender's bank account in the amount of \$10,000 was omitted from Government Exhibit 25 for identification.

Mr. Hagerty: Well, if your Honor please, I will object to that as leading and suggestive.

The Court: Overruled.

A. Yes, the account of Mrs. Olender had been omitted from the sworn net worth statement.

Q. (By Mr. Shelton): I will ask you whether or not there was an occasion of a conference on that item at which time were present Mr. Monroe Friedman, revenue agent Root, the defendant and yourself?

A. Yes, we had such a conference on October 18th.

Q. What year? A. 1948.

Q. And where did that conference take place?

A. In Mr. Root's office in Oakland.

Q. That is the Internal Revenue agent's office?

A. Yes, sir.

(Testimony of Melbourne C. Whiteside.)

Q. And I will ask you whether or not at that time, Mr. Olender stated an explanation concerning the omission of that \$10,000 bank account from what is now Government's Exhibits for identification?

A. He didn't give a complete explanation. He said that his wife had inherited \$3,000 from her mother and the [1182] deposit—or a portion of the deposits represented that money. He didn't explain the balance.

Q. Did he give the name of the wife's mother?

A. No, I don't believe he gave it at that time. We later determined it.

Q. And what did you later determine the wife's mother was named?

A. Mrs. Laura J. Foote.

Q. Mr. Whiteside, I would like to read you from page 461 of the transcript in this case, which is the testimony of Milton Olender, as follows:

“Q. Mr. Olender, you testified this morning that you received from your mother-in-law, Mrs. Foote, the sum of \$2,500? A. That is right.

“Q. When did you receive that money?

“A. In 1945.

“Q. Why was that money given to you by Mrs. Foote? A. For a very specific purpose.

“Q. I recall you so testifying this morning. What was the purpose?

“A. For her grandson to purchase his home with.

(Testimony of Melbourne C. Whiteside.)

“Q. And how long did you hold that \$2,500?”

“A. Oh, a few months after she passed away.

“Q. When was that? [1183]

“A. She passed away in August of 1945.”

I will ask you whether or not in the course of the conference that I referred to before you heard anything whatsoever about a \$2,500 gift for the purpose of a home for the grandson?

A. No, sir, we did not.

Q. I will ask you whether or not you ever heard such an explanation prior to the time given on the stand in this case?

A. No, sir, I never heard that before.

Q. Mr. Whiteside, at the two times that you conferred with Mrs. Mollie Olender what did she tell you about the deposits and withdrawals from the bank accounts in Fresno?

A. We were attempting——

Mr. Hagerty: If your Honor please, this calls for hearsay.

The Court: Overruled.

A. We were attempting to determine whether or not other cash had been available to make these gifts. Mrs. Olender told us it had been her practice to deposit all her receipts in the bank and withdraw it from the bank as she needed.

Mr. Shelton: You may examine.

Mr. Hagerty: If your Honor please, I would like to renew the objection and ask the jury be instructed to disregard that testimony, that that testi-

(Testimony of Melbourne C. Whiteside.)

mony be stricken [1184] from the record. We have no way of combatting. The grave has sealed that woman's lips. We can't bring her back to deny or to give her version of what she told this witness, and we are just stuck with his statement, which is purely hearsay.

The Court: Well, is it not true that other questions were directed to this witness bearing upon the same situation?

Mr. Hagerty: But his memory failed him as to the conversations that were had.

The Court: I thought that the avenues were opened then. May I have the answer again by this witness?

(Answer read back by reporter.)

Mr. Shelton: If your Honor please, the Government is agreeable to withdrawing the question and the answer.

The Court: That may go out.

Mr. Shelton: And request the jury be instructed to disregard it.

The Court: The jury is instructed to disregard it.

Mr. Shelton: In its place the Government will ask the following question:

Q. In connection with your investigation, Mr. Whiteside, were you able to determine any other bank accounts of Mrs. Mollie Olender, except the bank accounts covered in Government's [1185] Exhibits 52 and 53—in other words, the bank accounts

(Testimony of Melbourne C. Whiteside.)

in the Bank of America at Fresno and, what is that, the Security First National?

A. Yes, sir. Those are the only two banks that we found accounts open.

Q. And you found only the savings and commercial accounts of Mrs. Mollie Olender which I related to or included in Government's Exhibits 52 and 53?

A. That is correct.

Mr. Shelton: You may examine.

Recross-Examination

By Mr. Lewis:

Q. Did you check any bank accounts of Mrs. Olender in Los Angeles?

A. Yes, sir.

Q. Did you find any?

A. We found one which was closed out, to the Fresno branch of the Security First National.

Q. And you still do not remember asking her about the \$20,000 worth of bonds?

Mr. Drewes: Objected to as asked and answered, your Honor.

The Court: Sustained.

Mr. Lewis: That is all.

Mr. Drewes: That is all.

(Witness excused.) [1186]

DONALD A. JENSEN

called as a witness for the Government, sworn.

Mr. Hagerty: At this junction, if your Honor please, I had spoken before to counsel in reference to the leases covering the Fresno properties, and some checks covering partial payment of expenses.

Mr. Drewes: We have no objection to the introduction of the checks, your Honor. The leases appear to be immaterial, irrelevant.

Mr. Hagerty: We would offer the checks in evidence, your Honor, and also the leases as showing the distribution of the rents from the property as being made in the fractional method to the various heirs as testified to on the stand by the defendant.

Mr. Drewes: We would have no objection to the leases, if they had any probative force in that direction, but they appear not to have, your Honor.

The Court: Counsel brings the leases in in connection with the proration of those rents?

Mr. Hagerty: Yes.

The Court: I will allow it.

The Clerk: Defendant's Exhibits AN and AO in evidence.

(Thereupon the leases were marked Defendant's Exhibit AN in evidence and the checks AO in evidence.)

The Clerk: Please state your name, your address and [1187] your professional calling to the Court and to the jury.

A. I am Donald A. Jensen, director of the Fresno County Department of Public Welfare. I

(Testimony of Donald A. Jensen.)

reside at 4505 Madison Street in Fresno, California.

Mr. Hagerty: Might I suggest, counsel, at this time, as I understand the purpose of the Government is to introduce or to offer into evidence certain records which may or may not be admissible, and to guard against error in the record, might I suggest that we present our side of the position in reference to the admissibility then in the absence of the jury, and since it is close to the time for the afternoon recess, might we do that now?

The Court: All right. I have no objection.

The jury is excused for the afternoon recess, and take a brief recess with the same admonition, ladies and gentlemen.

(Following proceedings outside the presence of the jury):

Mr. Hagerty: As I understand the Government's position, the Government seeks to offer into evidence at this time certain affidavits in reference to the procurement of an old age pension for Mrs. Foote.

The Court: This matter was referred to previously in our colloquy concerning the admissibility of the affidavits, as well as the affidavit submitted by Mrs. Olender. [1188]

Mr. Hagerty: As I take it, and I believe I'm right—Mr. Drewes, you tell me——

Mr. Drewes: I will make a statement. There are in these files a number of form replies from various banks, your Honor, public welfare, Fresno, the

(Testimony of Donald A. Jensen.)

earliest one is 1939 through 1942, by which we seek to establish that Laura Foote had no cash in banks over that period of time. You will recall defendant's testimony that he received \$2,500 from Mrs. Foote which she had saved over a long period of time. There are also a number of reports reflecting much the same thing, which are filled out by the various investigators, as I take it, social workers from that department, in which successive dates are shown the assets of Mrs. Foote. It goes to the same point. And there is finally the affidavit of Mrs. Betty Olender, which is dated in May of 1939, in which she states that she has no cash in banks and no cash in—I think specifically in safe deposit boxes.

Your Honor will doubtlessly recall the defendant also testified that the gifts made over the ten-year period were made to himself and to his wife jointly. That, of course, goes to impeach that testimony. There is the purpose of the showing.

Mr. Hagerty: Well, if your Honor please, of course it is perfectly conceivable that a gift could be made to the [1189] husband and the wife not have knowledge of it.

Mr. Shelton: That is a matter of rebuttal evidence, if your Honor please.

Mr. Hagerty: But this covers a period of time prior to the indictment, 1939, and in the year 1943, by one of these records itself, February, 1943, the old age pension was discontinued as relatives assumed all the responsibility as of February 23, 1943,

(Testimony of Donald A. Jensen.)

which antedates the inquiry that we are concerned with here, 1945 and '46.

Mr. Drewes: There is no question but that these documents pertain to a period which antedates the indictment. However, they are material to the issues which I have just stated as to what happened between 1930 and 1940 by the defendant's own testimony.

The Court: During the years——

Mr. Drewes: When these gifts were——

The Court: ——were accumulating or allegedly accumulating.

Mr. Drewes: And also the \$2,500 which she allegedly accumulated over the period of years by his testimony.

Mr. Hagerty: The defendant has testified here that even his sister didn't know of these gifts during the period of time that it was going on.

Mr. Drewes: Well, those are out of the record, your Honor.

Mr. Hagerty: No, they are not. [1190]

Mr. Drewes: Those are matters to be rebutted.

Mr. Hagerty: It was on the record, the testimony of the defendant.

The Court: I think the documents are relevant.

Mr. Hagerty: I think that they are collateral impeachment, your Honor, at best, because there is not any affidavit there of the defendant.

(Further argument and discussion concerning the records of the Department of Public Welfare, Fresno County.)

(Testimony of Donald A. Jensen.)

The Court: The objection will be overruled.

(The following proceedings had in the presence of the jury):

Q. (By Mr. Drewes): Mr. Jensen, you are the director of the Fresno County Department of Public Welfare? A. I am.

Q. And how long have you held that position?

A. Since June of 1947.

Q. In response to a subpoena that has been served upon you have you brought with you the file of one Laura J. Foote? A. I have.

Q. And is that file from the official files of the Fresno County Public Welfare Department?

A. It is.

Q. Was it kept in the regular course of [1191] business?

A. Yes, it was kept in a locked file room.

Q. As the director, are you the custodian of those files? A. Yes, sir.

Q. May I see the file?

A. (Handing counsel.)

Mr. Drewes: Do you wish to examine them? (To counsel.)

Mr. Drewes: The Government will offer the files in evidence at this time, your Honor.

Mr. Hagerty: At this time, your Honor please, for the purpose of the record we will enter our objections to the admission of this file into evidence on the grounds that it is an attempt to collaterally

(Testimony of Donald A. Jensen.)

impeach the defendant on immaterial matters; it is hearsay; it involves statements of——

The Court: Counsel, I would suggest, without interrupting your objection, counsel, I would suggest that you offer such relevant or assertedly relevant documents as may be applicable or have a bearing on the controversy.

Mr. Drewes: I have given some thought to that problem. This is what I propose to do. I have before me photostatic copies of the documents in that file which the Government believes to be pertinent.

The Court: Why not offer the file for identification merely? Then if you have photostatic copies of certain abstracts from the files, then offer your photostats independently [1192] with the stipulation that they are true and correct copies of the items in the file, and as I indicated to you earlier, I will admit those subject to your objections. But the matter of offering the whole file should be done merely for identification.

The Clerk: U. S. Exhibit number 55 for identification only.

(Thereupon the file in re Laura Jane Foote, Department of Public Welfare, Fresno County, marked for identification U. S. Exhibit number 55.)

Mr. Drewes: Mr. Jensen, I show you a number of photostatic copies of documents and ask you if you have examined them?

A. I have examined them.

(Testimony of Donald A. Jensen.)

Q. And are those true copies of the documents which are in the file which you have just identified?

A. They are.

Mr. Drewes: May it be stipulated, counsel, that these documents, the photostats just identified, may be substituted for the file which has been marked for identification?

Mr. Hagerty: We would so stipulate, subject to our objection to their general admission into evidence, your Honor.

The Court: Now you state your objection. [1193]

Mr. Hagerty: We will object to their admission into evidence on the grounds they are hearsay, it is an attempt to impeach the defendant's testimony on collateral issues; furthermore that the whole scope covered by the documents in question at the dates the period covered within this indictment which is, namely, 1945 and '46, and the base year of 1944, and is not within the issues framed by the indictment.

The Court: And the objection is overruled.

The Clerk: U. S. Exhibit number 55 in evidence.

(Thereupon photostatic copies of extracts from the file in re Laura Jane Foote, Department of Public Welfare, Fresno County, received in evidence and marked U. S. Exhibit 55.)

(Testimony of Donald A. Jensen.)

Mr. Drewes: May I return the official file to Mr. Jensen? May that be withdrawn by consent of counsel?

Mr. Lewis: Yes.

Mr. Hagerty: Yes.

The Court: The official file may be withdrawn.

Mr. Drewes: And I will hand it back to Mr. Jensen.

The Court: Unless counsel for the defense desire for some reason to see it.

Mr. Hagerty: Well, during the cross-examination maybe we could investigate this file a little further.

The Court: You may go over it. [1194]

Mr. Drewes: Many of these documents are of great length and are detailed. For the purpose of speeding the presentation, your Honor, and with the Court's permission and consent of counsel, I propose to read therefore those parts which the Government believes to be pertinent, and observing the rights to read any parts which the defense wishes to put in the record. May that be done?

The Court: Yes.

Mr. Drewes: I will describe each document, ladies and gentlemen, and then simply read from it those parts as I have indicated which I think are pertinent to the issues here. As I stated before, some of them are very extensive and very detailed.

The first document is entitled, "Certificate of verification of eligibility which must accompany application for old age security," and it is dated the

(Testimony of Donald A. Jensen.)

15th day of May, 1959. There appears much, a considerable amount of data with respect to Laura J. Foote.

The date is—counsel advised me I stated the wrong date. The date is May 15, 1939.

There is a good deal of personal data in this document referring to Laura Jane Foote. One item is "Number 7," as follows:

"Has personal property value, \$152.09, including \$152.09 cash in account with daughter." [1195]

And that is signed by Edith V. Forest, County Visitor.

The next document, "Report of Investigation, old age security.

"Applicant's name: Laura Jane Foote.

"Address: 2914 Kearn Street, Fresno."

And again there is a good deal of data here.

"Real property: None.

"Personal property (Cash, mortgages, trust deeds, stocks, bonds, chattels).

"Owned by applicant: None. [1196]

"Insurance: None."

The last item on the first page is entitled, "Responsible relatives: (Spouse and adult children)," and there is noted there six children, and the name of each is given. The last is Betty B. Olender, address: Oakland; relationship: Daughter; "Form AG. 14 filed; yes. Household income: \$150; Number of dependents: Four.

"Applicant's present income from relatives: Housing from daughter, \$7.00."

(Testimony of Donald A. Jensen.)

It is signed Edith V. Forest and it is dated May 15th, 1939.

The next document is entitled, "Renewal Application, Old Age Security, year beginning June, 1940.

"County, Fresno.

"Full name of Applicant: Laura Foote.

"Section V. Changes: Have any changes occurred in the following for you or your spouse since last report:

"Property Holdings: No.

"Property Valuation: No.

"Property Encumbrances: No.

"Savings or cash on hand: No.

"Personal Property: No.

"Stocks, bonds, other securities: No.

"Earnings: No. [1197]

"Insurance: No."

That is signed Laura Jane Foote, and the date is August 7th, 1940.

On the back is the notation in longhand:

"Conditions remain the same. Recommend that aid continue."

Signed Dorothy Blakely, County Agent.

The Court: What is the date?

Mr. Drewes: That is the same date, August 7, 1940. It is the reverse form which I just—from which I just read.

The next report is captioned, "Alameda County Charities Commission, Property Report.

(Testimony of Donald A. Jensen.)

“Date: January 17, 1940.

“To: L. Burrill.

“Case No. 36458. Name: Foote, Laura Jane.

“Address, 351 Fairmount Avenue, Oakland.

“The property at above address is assessed to Emma L. Busby. We are unable to locate any property in the following names and no transfers appear on record since July 1, 1937:

“Laura Jane Foote.

“The above information is taken from the County records as of the following dates:

“Tax Collector’s records as of March 1, 1938.

“Assessor’s records as of date of transfers in Plat Books.” [1198]

That is dated January 17, 1940, and the signature I cannot read.

Q. Can you locate that on your records, your original files? A. Pardon me. What date?

Q. Alameda County Charities Commission, January 17th, 1940. A. I have the original here.

Q. And by whom is that signed, Mr. Johnson?

A. It looks like P. F. Holtzknecht.

Q. Thank you.

The next document is entitled “Recipient’s Affirmation of Eligibility for Old Age Security.”

It reads in part as follows:

“I, Foote, Laura Jane, residing at 2914 Kern, Fresno, herewith affirm my belief that I am eligible for old age security, to wit:

“I do not own real property with an assessed value in excess of three thousand dollars.

(Testimony of Donald A. Jensen.)

“I do not have personal property in excess of five hundred dollars.

“I have acquired personal property consisting of none since my last application for old age security.

“I have disposed of personal property consisting of no change since my last application for old age security. [1199]

“Earnings: None.

“Rentals or proceeds of sale of property: None.

“Annuities or insurance: None.

“Stock dividends: None.

“Interest: Interest on deposit approximately \$150 only.

“I have received during the past year other than old age security income from following sources: None.” That is signed Laura Jane Foote.

“Subscribed and sworn to before me this 16th day of June, 1941, Alice M. Hall, Deputy County Clerk.”

Now on the reverse of that form is “County Report of eligibility investigation:

“Real property: Verified information and source thereof. Property search on file. No property owned.

“2. Personal property: Verified information and source thereof: Bank of America, Oakland, Savings Account 46457—\$152.09 with Betty B. Olander.”

Dated June 30, 1941, signed Alice M. Hall, County Investigator.

(Testimony of Donald A. Jensen.)

The next document is in the form of a letter in reply. It is a prepared form on the same document. It is entitled "Fresno County, Department of Public Welfare, Fresno, California, June 17, 1941.

"Mrs. Laura Jane Foote.

"Dear Madam: [1200]

"All income and resources are to be taken into consideration in computing grants for blind aid and old age security as of July 1, 1941. It is therefore necessary that we have certain information at once so that we may complete our records. Please answer the following questions carefully and completely, sign and return to this office immediately:

"Alice M. Hall, social worker."

And then follows the part for the reply:

"What are your average monthly earnings: None.

"Do you receive cash or free room and board: You are taking \$7.00 per month out of my pension for room rent.

"(7) Do you have savings, postal savings or stocks from which you expect an interest or dividend payment in July? No."

And that is signed Laura Jane Foote and it is stamped as having been received on June 22, 1941. As I stated before, the date of the original letter was June 17, 1941.

The next document is entitled, "Recipient's Affirmation of Eligibility for Old Age Security.

"I, Laura Jane Foote, residing at 2914 Kern

(Testimony of Donald A. Jensen.)

Street, City Fresno, County of Fresno, California, herewith affirm my belief that I am eligible for old age [1201] security, to wit:

“I do not have personal property in excess of \$500.

“I have acquired personal property consisting of none since my last application for old age security.

“I have disposed of personal property consisting of \$150 savings since my last application for old age security.”

And then there are similar questions:

“Earnings: None. Rentals or proceeds of sale of property: None.

“Annuities or insurance: None. Stock dividends: None. Interest: None.”

That is signed Laura Jane Foote, and “Subscribed and sworn to before me this 17th day of June, 1942, Faye Clark, Deputy County Clerk.”

And again on the reverse side of this form, as in the earlier form that I read to you, is the “County Report of Eligibility Investigation.

“1. Real property: Verified information and source thereof. According to this statement she has no real property. Property search shows no recordings to 5/27/1942, no assessments to 5/29/1942.

“2. Personal property: Verified information and [1202] source thereof. Is claimed no personal property except her clothing and personal effects.”

And that is signed Faye Clark and is dated the 29th of June, 1942.

(Testimony of Donald A. Jensen.)

The file contains a number of forms which are entitled "Authorization by Application for Financial Investigation." I will read the first to you and that, of course, will suffice to describe them all.

"To: Any bank, trust company, postal savings department, Building and Loan Association, trust officer, insurance company or other financial institution.

"The undersigned who have applied for, or receiving, aid from the Fresno County Department of Public Welfare, hereby authorize you to furnish said Fresno County Department of Public Welfare any information in your possession with reference to any bank accounts, postal savings, policies, deposits or money in your institution now or hereafter to my credit.

"Our case No. 3630."

It is signed Laura Jane Foote. Address: 2914 Kern Street, Fresno, California.

And then there is a section, the last half of this form, entitled "Returns: Bank of America, Oakland, savings account No. 46457, Mrs. L. J. Foote (2916 Kern Street, [1203] Fresno) joint with 'Betty B. Olender or M. H. Olender.' Present balance, \$152.09."

That is dated May 5, 1939.

Now the next similar form, also signed by Mrs. Foote, does not itself bear a date but the return section is as follows:

"Security First National, Fresno, 5/10/39. No funds.

(Testimony of Donald A. Jensen.)

“Bank of America—Fulton 5/23/39, no funds.”

Mr. Jensen, “Fulton” is that a branch in Fresno, the Bank of America?

A. That is one of the branches of the Bank of America.

Incidentally, your Honor, I might explain these forms. At the time we sent out—we got the applicant’s signed statement releasing such information and then this form was cleared through all the major banks in Fresno, just one right after the other, to see if there was any funds on deposit which had not been reported. That is why there is a series of notations on the same form.

Q. Then the next is a similar form signed by Laura Jane Foote. The return is as follows:

“5/16/39, Central Bank. No account. Bank of America, no account. Central Bank, no account. Farmers & Merchants, no account. Anglo-California, no account. American Trust Company, no account.” [1204]

That is dated May 18, 1939.

The next form is similarly signed by Mrs. Foote. The return is as follows:

“Bank of America, September 27, 1940. No funds. Bank of America-Fulton, September 30, 1940, no funds. Security First National, September 30, 1940, no funds.”

The next form is also signed by Laura Jane Foote.

“Returns: Bank of America, Fulton, August 13,

(Testimony of Donald A. Jensen.)

1941, no funds. Security First National, August 22, 1941, no funds. Bank of America, main, August 28, 1941, no funds."

The next form is a similar form and also signed by Mrs. Foote:

"Returns: Bank of America, August 4, 1942, no funds. Security First National Bank, August 4, 1942, no funds. Bank of America, Fulton, August 15, 1942, no funds."

The next form has obviously the same purpose but it is somewhat different in form. This is addressed to the Bank of America, Branch No. 46457, Oakland, California, and it is dated the 25th of July, 1942.

"Gentlemen:

"We are enclosing herewith authorization for examination and report on any accounts the following may have, or may have had with you. [1205]

"Foote, Laura, Jane."

And then the reply on the same form:

"We have reviewed our records but they do not indicate that the above party has any accounts at this office. Bank of America, N.T. & S.A. Oakland Main Office, J. P. Fiorani, Assistant Cashier."

The file also includes the following document:

Statement of responsible relative of applicant under the Old Age Security Act of 1935.

"In order that the request of the below-named applicant may be considered, it is necessary that a statement of the financial condition of legally

(Testimony of Donald A. Jensen.)

responsible relatives, including children and spouse of the applicant, be furnished the State by the County. The preparation of this form by responsible relatives will greatly facilitate completion of the investigation which must be carried out through credit associations and others if the relative does not choose to prepare a statement. This form may be returned in care of the applicant or mailed directly to Fresno County, Department of Public Welfare, 2107 Inyo Street, Fresno, California.

Statement of responsible relative.

“I, Mrs. Betty Olender, 351 Fairmount, Oakland, California, [1206] of Oakland, County of Alameda, State of California, the daughter of Mrs. Laura Foote, an applicant for aged aid, do make the following answers to the questions below relative to my ability to aid such applicant.”

Then there are some immaterial questions which have been answered and the following heading:

“Assets: Do you or your spouse own your own home? No. What is the value of other real estate in which you have an interest?”

That is blank.

“Have you any cash on hand? No.

“Have you deposits in the bank: No.

“Have you deposits with building and loan associations: No.

“Have you postal savings: No.

“Do you keep funds in the safe deposit box? No.

(Testimony of Donald A. Jensen.)

“Do you own negotiable securities? No.

“Do you own other stocks, bonds, mortgages or securities? No.

“Do you own personal property?”

Then the amount is shown \$100.

“Have you a part interest in property?”

That is blank. Or there is a little dash in it.

“Do you have an automobile? Yes. Make and model: 1933 [1207] Buick. Value: \$100.”

Then there is a section of “Obligations.” None are shown.

“Monthly income: What is your salary? Zero.

“What income do you receive from building and loan associations, stocks and bonds, rentals, other income:”

And in each case is zero, zero, zero, zero.

“Does your property produce farm or garden produce for household use? Zero. What are your spouse’s earnings? \$150.”

And then there is a section for monthly expenses, and the following:

“County of Alameda, State of California, SS. Betty B. Olender, being first duly sworn, states upon oath that the answers to the foregoing are her own statements; that they are of her own knowledge true in every particular; that they are the whole truth and that she has not practiced evasion nor withheld information as to her ability to aid her parent or spouse.”

And that is signed Betty B. Olender.

(Testimony of Donald A. Jensen.)

“Subscribed and sworn to this 23rd day of May, 1939, before me, a Notary Public of the County and State above written, Joseph Croter, Notary Public in and for the County of Alameda, State of California.” [1208]

Will you turn to that particular affidavit, Mr. Jensen?

A. Can I have the date on that again, please?

Q. Yes. I will see if there is a date. May 26th, 1939. A. I have that.

Q. You will note, Mr. Jensen, that two lines are drawn through the name “Betty B. Olender,” apparently with pen, and the initials J.C.N.P. appear just above the signature of Betty B. Olender. Do you see that? A. Yes sir.

Q. Do you know why those lines are drawn through the name? A. No, I do not.

Q. Will you state, Mr. Jensen, according to your records, when Laura Jane Foote first received old age assistance?

A. She first received old age assistance in Fresno County in June of 1938. But that was on a transfer from Alameda County. The law in California provides that as an old age pensioner moves from one county to another the county where they originally reside will pay aid for a full year until they gain residence in the second county. I do not know the exact date she started to receive aid in Alameda County, but there is an application—her original application was signed in October of 1936.

(Testimony of Donald A. Jensen.)

Q. Is that in your files?

A. It is. A copy of that is in my files. Alameda County, when they transferred the case to Fresno County, sent a copy [1209] of the original application.

Q. Mr. Jensen, does your file reflect when Mrs. Foote ceased receiving old age assistance?

A. Yes. The file—and I will quote here—old age security was discontinued as relatives assumed all responsibility as of February 28th, 1943.

Mr. Drewes: I have no further questions.

Cross-Examination

By Mr. Hagerty:

Q. Mr. Jensen, do you know the defendant, Mr. Olender, who sits here?

A. I met him in the witness room last Thursday for the first time.

Q. But you never heard of him or had seen him before that time, is that true?

A. No, sir.

Q. So far as you know he has nothing to do whatever with those documents that you have before you and to which you have testified, is that true?

A. Your Honor, that is a difficult question for me to answer. On the face of these documents it would appear that Mr. Olender's wife certainly had her signature on some of them and that that would be—If your question would be construed as having—also excluding her and applying directly

(Testimony of Donald A. Jensen.)

to Mr. Olender, I would certainly answer in the affirmative, that he is not— [1210]

Q. He has directly nothing to do with those records, is that right?

A. That is right. If his wife is excluded in that question.

Mr. Hagerty: No further questions.

Mr. Drewes: I have no further questions.

The Court: The witness is excused.

(Witness excused.)

The Court: Have you completed the file? Is it stipulated that the file may be returned?

Mr. Lewis: Yes.

Mr. Hagerty: Yes.

Mr. Drewes: So stipulated.

The Court: Ladies and gentlemen, there are several matters I would like to discuss with counsel, and we might as well take the afternoon adjournment, resuming at ten o'clock tomorrow morning, with the same admonition to you.

(Thereupon the Jury was excused.)

(Discussion outside the presence of the Jury relative to presentation remaining.)

(Therefore an adjournment was taken until ten o'clock a.m. Tuesday, October 7th, [1211] 1952.)

October 7, 1952, 10:00 A.M.

The Court: The Jurors are present.

Mr. Hagerty: So stipulated.

Mr. Drewes: So stipulated.

MORRIS LERMAN

called by the defendant, sworn.

The Clerk: Please state your name, your address and your occupation or your calling to the Court and to the Jury?

A. My name is Morris Lerman. I reside at 653 Polama Avenue, Albany. I am a realtor investor for myself.

Direct Examination

By Mr. Hagerty:

Q. Mr. Lerman, would you tell His Honor and the ladies and gentlemen of the Jury what your occupation was, say in the year 1945?

A. In 1945 I was engaged in the so-called military supply business, such as uniforms, hats, caps, shoes and so forth, the need for military personnel.

Q. At this time I will show you Government's Exhibits Nos. 43 and 44, which appear to be checks, and ask you if you can identify them?

A. Those are my checks.

Q. There are two checks in the amount of \$2,500 each, is that [1212] true?

A. That's correct.

Q. Exhibit 44, drawn on May 14th, 1945, pay-

(Testimony of Morris Lerman.)

able to the American Trust Company, is that correct? A. That's correct.

Q. And Exhibit No. 43 is May 15—dated May 15, 1945, drawn payable to the same bank, the American Trust Company, in the same amount.

Could you tell the ladies and gentlemen of the Jury what these checks—what sort of a transaction they were drawn to cover?

A. Those checks were made payable to the American Trust Company for the purpose to secure two cashier's checks in payment for some sailor suits. The checks were originally made out to Mr. Lew Leavy, which was operating at that time a wholesale supply business of our needs.

Q. You had arranged for the purchase of suits from Mr. Lew Leavy, sailor suits?

A. That is true.

Q. And these checks were drawn to the American Trust Company in payment thereof?

A. That's correct.

Q. Did you receive any further checks from the American Trust Company to complete the transaction?

A. No, I received two separate checks of \$2,500 each. [1213]

Q. In other words, these two checks—with these two checks you bought cashier's checks?

A. That's correct.

Q. With the cashier's checks you paid Mr. Leavy for the suits?

A. That is correct.

(Testimony of Morris Lerman.)

Q. Did you know where the suits had been obtained originally?

A. Say it again, please?

Q. Let me withdraw it. I will restate it to you. Did you know where the suits had come from originally? A. No.

Q. That you bought from Mr. Leavy?

A. No.

Q. I show you Government's Exhibits 38 and 39, which appear to be invoices covering certain transactions. Can you identify them?

A. I can.

Q. What do they represent?

A. Well, they apparently represent a hundred suits each at \$25 each, which I believe the checks that I have drawn from the American Trust Company cover this invoice.

Q. In other words, it would be a fair statement to say then, Mr. Lerman, that those invoices cover the suits that you purchased with these checks? A. That is correct. [1214]

Q. Now, Mr. Lerman, you know the defendant, Mr. Olender, who is on trial here? A. I do.

Q. Do you know where his store was located at that time in Oakland?

A. Just a block away from my store, across the street.

Q. In other words, you were nearby competitors, is that true? A. That's correct.

Q. At that time did you know those suits had originated in his store? A. No, I did not.

(Testimony of Morris Lerman.)

Q. Now those suits, can you tell the ladies and gentlemen of the Jury what sizes they were and whether they were correctly labelled as to size?

A. Well, no, unfortunately they were not.

Q. You mean they were not correctly labelled as to size?

A. They were not correctly labelled.

Q. What sizes were they, large or small?

A. They were mostly large.

Mr. Shelton: If the Court please, might the witness be shown the two invoices in evidence in connection with those sales in connection with his testimony as to size?

The Court: Yes.

Mr. Hagerty: If your Honor please, this is direct [1215] examination. I think counsel understands trial procedure. He will have the opportunity of cross-examination.

The Court: All right.

Mr. Hagerty: To return, Mr. Lerman, you found that the suits were not correctly labelled, is that right?

A. Well, not in this particular case alone, but in prior cases it was a haphazard—the cutting of those suits were absolutely haphazard. In numerous other case I received——

Mr. Drewes: Objection, your Honor. May the testimony be confined to the transaction in question? The other cases are immaterial and irrelevant.

The Court: Yes.

Mr. Hagerty: Yes, we have to concentrate on

(Testimony of Morris Lerman.)

this particular transaction, Mr. Lerman.

Q. But is it fair to state, then, in this transaction you found that the suits were large and that they were labelled smaller sizes than they actually were?

Mr. Shelton: Objected to, your Honor. That is leading and suggestive to get the answer which counsel wants elicited, and I will object to it on that ground.

Mr. Hagerty: I will withdraw it and I will ask Mr. Lerman, will you please tell us—

A. Well, the sizes, they did not represent what the invoice called for. They were, the majority of those sizes, I would say, 80 to—75 to 85 per cent were erroneously marked. [1216] They were mostly large sizes, such as 40's, 42's, and in some cases were 38's, and very few 36's and no 34's, if I remember right.

Q. Mr. Lerman, the average man—well, let me withdraw that and say this. In your experience at that time in dealing with sailors in their requests for suits, did you find that the average sailor was a big man or a small man?

A. The majority predominate between 36 and 38.

Q. And then as a result the general demand for suits would be in the smaller sizes?

Mr. Shelton: Objected to, your Honor. The witness has just testified that the majority were in the middle sizes, and counsel is trying to lead for the answer he wants.

(Testimony of Morris Lerman.)

Mr. Hagerty: That is the answer I want.

Q. Is that considered a small size, 36 and 38?

A. I would say that is the average size. Smaller size than——

Q. It is lots smaller size than 42, isn't it?

A. Yes.

Q. Now, how could you handle these suits that were over-sized, Mr. Lerman, when the general demand was for smaller-sized suits?

A. We were forced to alter those suits.

Q. Did you operate a tailor shop in conjunction with your store? [1217] A. Yes, we did.

Q. You had a full-time tailor employed by you?

A. We had three people in our shop.

Q. So then you had immediately available the means of making the necessary alterations?

A. We did.

Q. To your knowledge, Mr. Olender, the defendant here, did he have a tailor shop in conjunction with his business?

A. I don't believe so. I never saw a tailor shop in his store.

Mr. Hagerty: You may cross-examine.

Cross-Examination

By Mr. Drewes:

Q. Mr. Lerman, you testified that the majority of sailors in your experience were size 36 and size 38. There were many, many sailors who were larger than that, were there not?

(Testimony of Morris Lerman.)

A. Yes. But as a rule the kids who used to be in the Navy, they were small boys.

Q. But there were many who were not?

A. That's true. But I say the majority is 36 and 38.

Q. With respect to the U. S. Exhibits Nos. 38 and 39, which are the invoices that you have identified, I call your attention to No. 38, which shows ten size 35's. Did you get those suits?

A. Well, I couldn't remember that far back if I did or [1218] didn't. But I remember this, that if we did get them, they were not to the size. I mean, they were not—35, maybe 38.

Q. The other invoice, Exhibit No. 39, there are fifteen size 35's. Didn't you get any size 35's?

A. Possibly.

Q. Both of those invoices are dated in 1945, in May, and that was the date of the transaction?

A. That's correct.

Q. And that was some approximate seven years ago?

A. That's right.

Q. And can you say now that you got no 35's, no 36's, no 37's?

A. If I got—received any, it was a very small proportion of what they should be, if I received any. But, however, I can't recollect that far back.

Q. You were very glad to get those suits, were you not?

A. Very much so.

Q. As a matter of fact, not long ago in my office you said they were just like gold to you?

(Testimony of Morris Lerman.)

A. That's right.

Q. You remember that. You have known Mr. Olender for quite some time, have you not, Mr. Lerman?

A. I have.

Q. About how long? [1219]

A. Oh, I imagine about—I have known him off and on for at least 15 years or maybe longer than that, but more closer since I went in that line of business.

Q. And speaking of "that line of business," during the years in question?

A. During the years 1942 to 1947.

Q. Between the years 1942 and 1947 did you sometimes buy merchandise from Mr. Olender when you were short and did he sometimes buy merchandise from you?

A. Well, there was a reciprocity between the dealers to help one another.

Q. And you sometimes helped Mr. Olender by giving him merchandise when he was short and—

A. Occasionally.

Q. —and he sometimes helped you by giving you merchandise when you were short?

A. Occasionally.

Q. You would say, would you not, that you were friendly competitors?

A. We were.

Q. And is it not true, Mr. Lerman, that you and Mr. Olender belonged to clubs, the same clubs, in Oakland?

A. That is true.

Q. What clubs do you belong to?

(Testimony of Morris Lerman.)

A. We belong to the Lions Club, belong to the Shriners' Club, [1220] the Athens Athletic Club.

Q. Do you see Mr. Olender almost every week?

A. Practically every week at luncheon on Wednesday, particularly, the Lions Club.

Mr. Drewes: Thank you. That is all.

Mr. Hagerty: No further questions.

(Witness excused.)

Mr. Shelton: Mr. Carroll of the Bank of America, please.

Mr. Hagerty: If your Honor please, just to keep the record straight and so forth, Mr. Lerman was our last witness, and the defense rests at this time.

CLIFFORD F. CARROLL

resumed the stand on behalf of the Government in rebuttal, and having been previously duly sworn, testified further as follows:

The Clerk: You have heretofore been sworn in this case?

A. I have.

Q. You are still under oath.

A. Yes, sir.

Q. Please restate your name?

A. Clifford F. Carroll. [1221]

Direct Examination

By Mr. Shelton:

Q. Mr. Carroll, you have previously testified in this case and stated your connection with the

(Testimony of Clifford F. Carroll.)

Bank of America in Oakland? A. I have.

Q. And you have been asked this morning to produce designated records of your bank?

A. I have.

Q. Will you state whether or not all these records which you have produced today were kept in the regular and usual course of the bank's business?

A. They were except the ledger cards, which I have made copies of.

Q. And those are true copies of original records of the bank? A. They are.

Q. Will you state whether or not you examined them to see that they were correct copies?

A. I did.

Q. Mr. Carroll, have you produced this morning two records of loans made by the Army & Navy Store from your bank, one in the year 1945, and one in the year 1946? A. I have.

Q. Referring to the one in 1945, Mr. Carroll, will you state the date of that application for a loan by the Army & [1222] Navy Store?

A. Mr. Counsellor, these are applications by Milton Olander.

Q. All right. Applications then by Milton Olander. What is the date of the 1945 application, Mr. Carroll? A. July the 11th, 1945.

Q. July 11th, 1945. And does the application show the term of the loan?

A. The maturity date, you mean?

(Testimony of Clifford F. Carroll.)

Q. The length of time the loan was——

A. The maturity—it was supposed to be paid the 10th day of—wait a minute—October 9, 1945.

Q. That would be a three-month loan, then, would it not, approximately?

A. Approximately.

Q. And does that record show the amount of that loan? A. It does.

Q. How much? A. \$30,000.

Q. Now turning, Mr. Carroll, to the—strike that. Does the application show the purpose for which that loan was negotiated?

A. According to this application, this here record, Mr. Olender was to use this to—use the funds to buy naval uniforms and to liquidate all or part of this loan at [1223] maturity.

Q. Does that indicate then that Mr. Olender intended at the time he applied for the loan——

Mr. Hagerty: I will object to this form of questioning, your Honor. It is a summing up in a summarization of the witness' testimony again——

Mr. Shelton: I will rephrase it.

Mr. Hagerty: The thing that Mr. Shelton found objection to.

Mr. Shelton: I will rephrase it, counsel.

Q. Will you state, Mr. Carroll, what that loan application indicates as to whether Mr. Olender intended to pay off the whole loan at maturity, whether or not he intended to——

(Testimony of Clifford F. Carroll.)

A. It is to liquidate all or part of this loan at maturity.

Q. Thank you, Mr. Carroll. Now does the application also indicate what security Mr. Olender put up for that loan? A. It does.

Q. What security did he put up?

A. U. S. Treasury bond.

Q. In what amount, please?

A. \$10,000 U. S. Treasury bonds of 1951-53. \$13,000 U. S. Treasury bonds of 1952-54. \$8,000 Treasury bonds of 1952, and \$1,000 U. S. Treasury bonds 1956.

Q. Will you state whether or not that total would amount to \$32,000? [1224]

A. It would.

Q. Turning now, Mr. Carroll, to the 1946 loan, what date did that become effective?

A. On August 22, 1946.

Q. And does that indicate the length of the loan, the length of time for which the money was borrowed?

A. Maturity date is to be paid by 11/30/46.

Q. That would be a little more than three months? A. It is 11/20/46.

Q. That would be a three-month loan, then, would it not? A. Approximately.

Q. And does the application indicate the amount of the loan? A. It does.

Q. How much, please? A. \$10,000.

Q. Does the application indicate the purpose of the loan?

(Testimony of Clifford F. Carroll.)

A. To cover part of the purchase price of a new home which he recently bought.

Q. Does the application indicate whether or not collateral was put up for the loan?

A. It does.

Q. What does it indicate?

A. \$10,000 U. S. bonds, Treasury bonds.

Q. May I have those two sheets?

A. (Witness producing.) [1225]

Mr. Shelton: The Government will offer the 1945 loan application as its Exhibit next in order on the 1946 as the one following that.

The Court: They may be marked.

The Clerk: U. S. Exhibit No. 57 in evidence.

(Thereupon the loan application, 1945, 1946, was received in evidence and marked U. S. Exhibit No. 57.)

Q. (By Mr. Shelton): Mr. Carroll, have you produced here a deposit slip in the amount of \$15,000 dated June 1st, 1945? A. I have.

Q. And may I see it, please?

A. (Witness producing.)

Mr. Shelton: I show this to counsel (handing to counsel).

Counsel, is there any objection to our offering a copy in evidence and letting Mr. Carroll take the original?

Mr. Hagerty: No objection.

Mr. Shelton: The Government will offer the copy of the deposit slip as its exhibit next in order.

(Testimony of Clifford F. Carroll.)

The Court: It may be marked.

The Clerk: U. S. Exhibit No. 58.

(Thereupon deposit slip, \$15,000, June 1, 1945, was received in evidence and marked U. S. Exhibit No. 58.)

Q. (By Mr. Shelton): Mr. Carroll, will you state what account that money was deposited in as shown by the deposit [1226] slip?

A. Milton H. Olender.

Q. Will you state whether or not that was the commercial account? A. It was.

Q. Will you state in what form the \$15,000 was deposited as shown by the deposit slip?

A. It shows \$15,000 cash, currency.

Q. Mr. Olender, have you also produced here a ledger card and a—

Mr. Hagerty: Mr. Carroll.

Mr. Shelton: What did I say?

Mr. Hagerty: Olender.

Q. (By Mr. Shelton): Mr. Carroll, have you also produced here a ledger card and a signature card of the Army & Navy Store commercial bank account, 1026 Broadway? A. I have.

Q. May I have the signature card or cards, Mr. Carroll?

A. There is the original signature card of the Army & Navy Store.

Q. May I have the ledger sheet at the same time, if you can locate that?

A. Do you want the dates?

(Testimony of Clifford F. Carroll.)

Q. Yes. Will you give the dates covered by that ledger sheet? [1227]

A. These ledger sheets cover the commercial account for the Army & Navy Store at the Oakland office of the Bank of America from December 31st, 1943, to and including December 31st, 1946.

Mr. Shelton: The Government will offer these two signature cards of the Army & Navy Store account as its exhibit next in order.

Mr. Hagerty: No objection, your Honor.

The Court: They may be marked.

(The signature cards referred to were thereupon received in evidence and marked U. S. Exhibit No. 59.)

Mr. Shelton: The Government will offer as its exhibit No. 60 true copies of the ledger cards of the same account for the period December 31st, 1943, to December 31st, 1946, inclusive.

The Court: They may be marked.

(The ledger cards referred to were thereupon received in evidence and marked U. S. Exhibit No. 60.)

Q. (By Mr. Shelton): Mr. Carroll, have you also produced a signature card and a ledger account for savings account No. 35225 in the name of Mrs. M. H. Olender? A. I have.

Q. May I have those, please? Will you please state what period is covered by the ledger card?

(Testimony of Clifford F. Carroll.)

A. This statement, ledger card, covers the savings account [1228] No. 35225 in the name of Betty Olender from December 20th, 1945, to September 7th, 1951. As a matter of fact, it has no entries at that last date except the interest credits.

Mr. Shelton: I will state to the Court and counsel that the ledger card is being offered only as to the period through 1946. We agree that the later period has no relevancy, your Honor.

The signature card of Mrs. M. H. Olender on this account is offered as Government Exhibit 61.

The Court: It may be marked.

(The signature card referred to was thereupon received in evidence and marked U. S. Exhibit No. 61.)

Mr. Shelton: The ledger card through the period December 31st, 1946, is offered as Government's Exhibit No. 62.

The Court: It may be marked.

(The ledger card referred to was thereupon received in evidence and marked U. S. Exhibit No. 62.)

Q. (By Mr. Shelton): Mr. Carroll, have you also produced here pursuant to subpoena some cashier's checks of your bank? A. I have.

Mr. Shelton: Mr. Hagerty has just asked me about putting in the originals here and my arrangement with Mr. Carroll was that the Government would either have photostats [1229] made by per-

(Testimony of Clifford F. Carroll.)

mission of the Court or else would work out an arrangement to return these at the end of the trial after giving Mr. Carroll a receipt.

Mr. Hagerty: It was a matter of no particular interest to us, but we thought for the convenience of the bank——

The Witness: That is an active savings account. I would like to have that back. I can produce a photostat. It is an active savings account.

Q. (By Mr. Shelton): I thought you said you could take a letter, didn't you? Didn't you say I could write you a letter?

A. Regarding the checks.

Q. I beg your pardon. I understood that applied to this also. A. No.

Q. Do you have a photostatic copy of this ledger sheet?

A. Not right now I do not. I can have it tomorrow.

Mr. Hagerty: We will stipulate that it can be withdrawn and photostated. I think that is the same as one of our exhibits, isn't it?

Mr. Shelton: I am speaking of the Olender savings account.

Mr. Hagerty: I think we have her bank book in evidence.

Mr. Shelton: A different record showing the same thing.

Mr. Hagerty: The same thing. [1230]

Q. (By Mr. Shelton): I was asking, Mr. Car-

(Testimony of Clifford F. Carroll.)

roll, if you had produced some cashier's checks and had produced the applications therefor so far as available? A. I have.

Q. Have you produced cashier's check No. 25114579 for \$1,000 purchased on May 29th, 1946?

A. What is that amount again?

Q. \$3,000?

A. I did not hear that date again, counsellor.

Q. It is May 29th, 1946, Mr. Carroll.

A. I have.

Q. Have you also produced cashier's checks Nos. 25105210 and 5211 in the amounts of \$10,000 and \$15,000, respectively, purchased December 5, 1945?

A. I have the one for \$15,000. Is that what you asked?

Q. And the \$10,000 also of the same date, Mr. Carroll. A. That is December 5th?

Q. Yes, December 5th, 1945. A. I have.

Q. Have you also produced No. 15196778 in the amount of \$3,000, the next one, 79, in the amount of \$3,500, the next one in the amount of \$3,500, and the final one in the amount of \$5,000, all purchased about May 24th, 1945?

A. Counsellor, I will have to stop you. You are going too fast for me. Start in again. [1231]

Q. They were four consecutive ones, Mr. Carroll, dated May 24th, 1945, and the ending serial numbers are 78, 79, 80 and 81.

A. They are both dated May 31st?

(Testimony of Clifford F. Carroll.)

Q. All four dated on or about May 24th according to the subpoena. That may not be quite right.

A. I have 25196780 and 25196781.

Q. You also have 78 and 79, which are the two immediately preceding those by number?

A. How much are they?

Q. The first one is \$3,000 and the second one is \$3,500.

A. I have 6778, 779, \$3,500.

Q. You have a total of seven there that I have asked for in this group?

A. One, two, three, four, five, six and seven.

Q. To what extent, Mr. Carroll, were you able to find applications for these seven cashier's checks that you have handed me?

A. I only have one application for all the checks.

Q. Will you hand that one to me, please?

A. I will have to tear this out.

Q. Will you state, if you know, Mr. Carroll, what happened to the remaining applications?

A. They are destroyed after five years.

Q. In the normal course of the bank's [1232] business?

A. Yes, sir.

Mr. Shelton: The Government will offer as its collective exhibit next in order the seven cashier's checks and the one application produced by the witness.

The Court: So ordered.

(The checks and application referred to were thereupon received in evidence and marked U. S. Exhibit No. 63.)

(Testimony of Clifford F. Carroll.)

Q. (By Mr. Shelton): Mr. Carroll, have you also produced a cashier's check in the amount of \$15,833.46 dated on or about June 5th, 1945?

A. I have.

Q. Will you state whether or not you were able to locate an application for that cashier's check?

A. I was not successful.

Q. May I have the check? A. Yes.

Mr. Lewis: No objection.

Mr. Shelton: This cashier's check is offered as Government's Exhibit 64.

The Court: It may be marked.

(The cashier's check referred to was thereupon received in evidence and marked U. S. Exhibit No. 64.)

Q. (By Mr. Shelton): Mr. Carroll, I will ask you for a series of nine cashier's checks and the applications therefor. Each of the nine checks is in the amount of either \$2,250 or [1233] \$2,350, and they are all dated in January of 1944.

A. I have them.

Q. Will you state whether or not you were able to locate any applications for those nine cashier's checks, Mr. Carroll?

A. Those applications have been destroyed.

Mr. Shelton: The Government will offer these nine cashier's checks in evidence as its exhibit next in order.

The Court: They may be marked.

(Testimony of Clifford F. Carroll.)

(The cashier's checks referred to were thereupon received in evidence and marked U. S. Exhibit No. 65.)

Q. (By Mr. Shelton): Mr. Carroll, will you state whether or not each of these nine cashier's checks is made payable to the same person?

A. They are.

Q. Who is that person?

A. George Goodman.

Mr. Shelton: You may examine.

Cross-Examination

By Mr. Hagerty:

Q. Preliminarily I might ask you, Mr. Carroll, since you have already been qualified as an employee of the Bank of America, you are familiar with their usual bank books and checks, is that true?

A. I am familiar with their general ledger cards, general stationery, books and whatnot. I was in the bank thirty years [1234] last month.

Q. Mr. Carroll, when you were here before you remember we had certain interrogations of you with reference to the safety deposit boxes of the defendant?

A. Yes, sir.

Q. In the interim were you able to ascertain the dimensions of certain of those boxes? I believe you wanted that information, too, counsel.

Mr. Shelton: I did not hear the question.

(Testimony of Clifford F. Carroll.)

Mr. Hagerty: The size of the safety deposit boxes.

Mr. Shelton: In any event, you wanted it. We didn't ask for it.

A. Discussion of the safe deposit box concerned, I presume, a \$4 box?

Q. (By Mr. Hagerty): No. 2912. Would that be a \$4 box? A. Yes.

Q. Could you give us the dimensions of it?

A. The dimensions—they run 19½ inches long, 5 inches wide, and they vary from an inch and a half to two inches in depth.

Q. Box 56—could you tell us the dimensions of it? That is probably a \$12 box. Would that refresh your memory?

A. No, I have never measured that.

Q. Do you have any idea how much currency or, using large denominations of bills, you could place in this small box, [1235] the \$4 box?

A. Approximately 900 pieces of paper.

Q. About 900 pieces of paper. If they happen to be thousand dollar bills——

A. I mean the normal size currency.

Q. 900 individual items?

A. Approximately that. Sometimes a little more, sometimes a little less.

Q. I will show you here a bank book and ask you if you could identify it.

A. This is a savings pass book No. 129, depositor's name is Milton H. Olender, carried at

(Testimony of Clifford F. Carroll.)

the Bank of America, Fresno Branch, Fresno, California.

Q. Could you tell us what is on deposit there?

A. \$3,000.

Q. And the date of it?

A. You would have to have better eyesight than I have to see that. December 22nd, forty something—49 or 41.

Mr. Hagerty: At this time, if your Honor please, I would offer this passbook as the defendant's next exhibit.

Mr. Shelton: No objection, your Honor.

The Court: It may be marked.

(The passbook referred to was thereupon received in evidence and marked Defendant's Exhibit AP.)

Q. (By Mr. Hagerty): I show you a check, Mr. Carroll, and [1236] ask you if you can identify it?

A. That is a check drawn by the Army & Navy Stores, commercial account of the Oakland main office, Bank of America, dated May 24th, 1945, payable to Milton Olender in the amount of \$15,000. It looks to me like it is signed, "M. Olender."

Q. Do the endorsements indicate anything as to whether the check has been cashed or paid by the bank?

A. It indicates to me that it was negotiated through the collection department. It was not deposited. It was not cashed.

(Testimony of Clifford F. Carroll.)

Q. I point out to you, Mr. Carroll, an apparent rubber stamp mark on the face of the check. Would that indicate anything?

A. It would indicate the collection department.

Mr. Shelton: At this time, if your Honor please, I would offer this check as defendant's Exhibit next in order.

Mr. Hagerty: No objection, your Honor.

The Court: It may be marked.

(The check referred to was thereupon received in evidence and marked Defendant's Exhibit A.Q.)

Mr. Hagerty: No further questions of this witness.

Redirect Examination

By Mr. Shelton:

Q. Mr. Carroll, showing you this last check Mr. Hagerty introduced in evidence, I will ask you whether [1237] or not the stamp on that check indicates to you that that might have been used to purchase four cashier's checks?

A. It would.

Q. As a matter of fact, Mr. Carroll, there were four cashier's checks which you brought in here at our request purchased on that same day, May 24th, 1945, were there not?

Mr. Hagerty: Is that the date?

Mr. Shelton: Mr. Clerk, may I see those checks? Your Honor, that is later. Will your Honor indulge us a minute?

(Testimony of Clifford F. Carroll.)

Q. Mr. Carroll, I will direct your attention to the endorsements on the back of the check and ask you if you can determine on what date payment was made on that check?

Your Honor, in the interests of time, may I ask the witness whether he can see "June 1st" on the back? A. June 1st, 1949.

Mr. Shelton: Thank you, Mr. Carroll. Is that 1945, Mr. Carroll?

The Witness: Let me look at that again, will you, please? 1945 is correct.

Mr. Shelton: Thank you, Mr. Carroll. If your Honor please, may we have permission to withdraw such of these exhibits as are necessary for photostating and return the originals to Mr. Carroll. We have no further questions.

Mr. Hagerty: We have no questions.

The Court: The witness is excused. [1238]

The Witness: Thank you, your Honor. May I withdraw the savings ledger card and the signature card on the savings account of Betty Olender and I will furnish a photostatic copy tomorrow.

Mr. Hagerty: We have no objection, your Honor, and the same entries are covered in defendant's Exhibit D, which are Betty Olender's bank account.

The Court: Very well. We will take a recess at this time. Remember the admonition, ladies and gentlemen, not to discuss the case.

(Recess.) [1239]

LOUIS H. MOOSER

recalled on behalf of the Government, previously sworn.

The Clerk: Mr. Mooser, you have heretofore been sworn. Will you please restate your name?

A. Louis H. Mooser.

Direct Examination

By Mr. Shelton:

Q. Mr. Mooser, at my request have you made a search of the records of the Office of the Collector of Internal Revenue for the years 1939 to 1945 to determine whether any income tax return was filed in those years by Mrs. Laura Jane Foote of 2914 Kern Street, Fresno?

A. Yes, sir, I have.

Q. What did that search show, Mr. Mooser?

Mr. Hagerty: If your Honor please, I will object to it as being incompetent and irrelevant, immaterial, not within the issues of this case.

The Court: Overruled.

A. I was unable to find any such return for those years.

Mr. Shelton: For any of the seven years in question?

A. That's correct.

Mr. Shelton: You may examine.

Mr. Hagerty: We have no questions.

Mr. Shelton: Thank you, Mr. Mooser.

(Witness excused.) [1240]

SETH L. ROOT

recalled on behalf of the Government, sworn.

The Clerk: Mr. Root, you have heretofore been sworn?

A. Yes.

Q. Please restate your name for the record.

A. Seth L. Root.

Direct Examination

By Mr. Shelton:

Q. Mr. Root, you are an Internal Revenue agent? A. Yes.

Q. Were you in Court at the time that Mr. Olender was asked concerning a conference with you on January 13, 1948? A. Yes.

Mr. Shelton: As the Court and Jury, I believe will recall, Mr. Olender was asked at that time whether he had any conversation with Mr. Root about the Goodman transactions, at the time of that conference.

Mr. Hagerty: If your Honor please, I don't like to criticize counsel, but I don't think the statements are necessary all the time, preliminary statements as to what is going to be outlined. If he wants to make a preliminary showing, we could remove the Jury.

The Court: I suppose it points up the situation for the reception of testimony. In this particular instance it did not do any harm, as I see it. [1241]

Q. (By Mr. Shelton): Mr. Root, I will read

(Testimony of Seth L. Root.)

from page 832 of the transcript in this case. The witness at that time was Mr. Olender, and on examination by Government counsel, the following question and answer occurred:

“Q. I will ask you whether or not it is also a fact that on that occasion in your office you told Revenue Agent Root you were unable to recall the circumstances of the transaction with Mr. Goodman?”

“A. I don't remember that, sir.”

Will you tell the Court and the Jury what transpired with respect to that matter after your conference with Mr. Olender on January 13, 1948?

The Court: Who were all the persons present, Mr. Witness?

A. Mr. Olender and I were the only persons present at this conference—if you want to call it that. I was working on his books at his place of business at that time, and in the course of the conference I asked him if he was able to recall the circumstances of the Goodman transaction which Mr. Blanchard had covered with him before and he said at that time that he was still unable to recall the circumstances of that transaction.

Mr. Shelton: You may examine.

Cross-Examination

By Mr. Lewis:

Q. Mr. Root, I show you United States [1242] Exhibit 45, and directing your attention to “Goods received as follows”——

A. Yes.

(Testimony of Seth L. Root.)

Q. Did you supply that information for Mr. Ringo?

Mr. Drewes: I will object, your Honor, on two grounds; first, that it is improper cross-examination, and, second, that the Government Exhibit No. 45 as introduced in evidence was limited to item 19 alone.

The Court: Mr. Lewis may call him as his own witness on that behalf. I don't have any objection.

Mr. Drewes: Will you, Mr. Lewis, state you are calling the witness as your own witness?

Mr. Lewis: Yes.

The Court: As to that item, he may.

A. Will you restate the question?

Q. (By Mr. Lewis): Did you give the information to Mr. Ringo, the dates of the Goodman goods' arrival?

A. Yes, that was furnished to Mr. Ringo at a date subsequent to this conference.

Q. Will you read the dates?

A. May 25, 1944, \$1,610. June 8th, 1944, \$9,200. June 14, 1944, \$690. Balance—with a question mark—\$9,000.

The Court: Where was that determination made, from way bills or—— [1243]

A. Yes, those were made from——

The Court: Invoices?

A. Invoices.

The Court: Invoices or way bills?

A. From invoices.

(Testimony of Seth L. Root.)

The Court: All right.

Mr. Lewis: Your Honor, at this time I will ask that United States Exhibit 45 become a defendant's exhibit for the purposes of showing when the Goodman goods were received.

Mr. Shelton: Mr. Lewis, could you make it a little clearer what you are offering? Are you offering—

Mr. Lewis: I am offering the portion of the exhibit at the bottom of the page reading as follows:

“Goods received as follows:

“5/25/44, \$1,610.

“6/4/44, \$9,200.

“6/14/44, \$690.

“Balance, \$9,050.

“Total, \$20,550.”

Mr. Shelton: As appearing on the first page of the exhibit?

Mr. Lewis: Yes.

Mr. Drewes: If your Honor please, the exhibit was made by Mr. Ringo, who was the defendant's then accountant. I submit that if the defense is going to offer that exhibit [1244] or any part of it, it should be offered as to its entirety.

Mr. Lewis: Your Honor, I think the information—Mr. Root testified he gave that information to Mr. Ringo.

The Court: I think possibly we are enlarging upon a situation that requires only an explanatory

(Testimony of Seth L. Root.)

note. This witness has explained the date of arrival of certain goods. This witness states that he gave the information to Mr. Ringo as to the dates. Now that explanation, it would seem to make little difference to the Court who offered the exhibit, who sponsored the particular matter. That is an explanatory note in the record.

Mr. Lewis: That's right.

The Court: If you did not have the exhibit, if you had lost the exhibit, there stands on record testimony in the case.

Mr. Lewis. That's right.

The Court: So it is immaterial who offers it. The exhibit is marked U. S. Exhibit No. 45 in evidence. This witness has explained certain phases of it. That seems to be sufficient.

Redirect Examination

By Mr. Shelton:

Q. Mr. Root, I will ask you the source of the information with respect to those transactions which you furnished to Mr. Ringo as questioned by Mr. Lewis?

A. Those were invoices that I received from special agent [1245] Blanchard at a time subsequent to the time that I met with Mr. Olender.

Q. In other words, you received those from Mr. Blanchard after January the 13th, 1948?

A. Yes.

Q. Mr. Root, will you state whether or not the

(Testimony of Seth L. Root.)

goods that were shown as received by those invoices were tied in with the original Goodman purchase of \$20,550, or did you make some assumption in that regard?

A. Well, these merely show George Goodman invoices. Whether it is—that those are the identical goods that were originally purchased, I cannot—I cannot say.

Q. It is my understanding, then, that you do not know then whether these figures that you put on this exhibit represent part of the original goods purchased with the \$20,550?

Mr. Hagerty: If your Honor please, I will object——

The Court: Sustained.

Mr. Shelton: If your Honor please, for this purpose, isn't it cross-examination because he was Mr. Lewis' witness on this point and therefore the Government is entitled to ask leading questions on a matter on which Mr. Lewis made Mr. Root his witness?

Mr. Hagerty: If your Honor please, this witness is undoubtedly an adverse witness to us. He is also the witness of counsel on that particular point. They have discussed [1246] this in advance.

The Court: May I see the exhibit again? Would you rephrase that question, counsel?

Q. (By Mr. Shelton): Mr. Root, then do you know whether or not these transactions evidenced by the invoices were the same transactions evi-

(Testimony of Seth L. Root.)

denced by the \$20,550 of Goodman cashier checks dated January, 1944? A. No.

Mr. Shelton: You may examine.

Recross-Examination

By Mr. Lewis:

Q. You don't know whether they are the same, you don't know whether they are not, do you, Mr. Root? A. I am unable to identify the goods.

Q. I think in your direct examination you testified to a meeting and that Mr. Olender did not explain to you or did not recall facts of the Goodman transaction. Did you read Mr. Olender's affidavit given to the Government on the 13th day of September, 1948?

Mr. Shelton: Just a minute. Your Honor, objected to as not proper redirect. Proper recross, I suppose you would call it. That wasn't taken up by me in questioning Mr. Root on redirect.

The Court: Overruled.

A. Will you state that again?

Q. (By Mr. Lewis): I say, Mr. Olender gave you an affidavit [1247] outlining this transaction in September of 1948, didn't he?

A. Yes, that was at a time subsequent to this original meeting.

Q. And also Mr. Leavy gave you an affidavit at about the same time?

A. Well, those were submitted with the net

(Testimony of Seth L. Root.)

worth statement which Mr. Olender furnished, furnished me.

Mr. Lewis: That is all.

Further Redirect Examination

By Mr. Shelton:

Q. Mr. Root, by September, 1948, your investigation had proceeded to a rather advanced stage, had it not?

Mr. Hagerty: I will object to that. It is calling for the conclusion and opinion; it is leading and suggestive of his own witness. He is on redirect examination of his own witness now.

The Court: Overruled.

A. Why, I had requested the net worth statement from Mr. Olender and it was about that time that Mr. Olender submitted it, and in the meantime the investigation, certain phases of it, were being carried on.

Mr. Shelton: No further questions.

Mr. Lewis: No further questions.

The Court: In clarification of the examination conducted by the Government and the defense counsel, the Court [1248] desires to direct a question to you, Mr. Witness.

Would you read into the record for the benefit of the Court and the Jury commencing at No. 20 the legend and then the dates and the amounts and the corresponding totals so that this will appear as the climax to the examination.

(Testimony of Seth L. Root.)

First, what is the significance of No. 20 in the marginal area?

A. Well, at the time Mr. Ringo advised me that Mr. Olender retained him to prepare this net worth statement, he wanted to know the particular problems that were going to confront him.

The Court: He, Ringo?

A. Yes.

The Court: And then, as I gather it you and Ringo had a discussion?

A. Yes.

Q. And you then indicated to Mr. Ringo the points of controversy, is that correct, or the points of difference?

A. I said that we had a question here of some merchandise which had been purchased from one George Goodman and I wanted him to be aware of that fact in doing his work.

The Court: I see. Now, how many other points did you have up? Was this the last point, No. 20? I notice they go in order down the line.

A. Well, without going through this entire thing I wouldn't [1249] be able to tell.

The Court: At least, it was one of the major points of difference?

A. Yes, this was a major point, yes. And item 20 he has—Ringo has noted as being "Story on merchandise purchased from Goodman in 1944, as follows:"

The Court: That is his writing?

(Testimony of Seth L. Root.)

A. Yes, all this is his writing.

The Court: All right. Then he goes on—how does he go on?

A. "January 10 of 1944, 3 cashier's checks at \$2,250 each, \$6,750 total."

The Court: Those checks have been referred to in evidence?

A. Yes.

The Court: They are before us.

A. Yes.

The Court: All right.

A. January 22, 1944, three cashier's checks at \$2,250 each, \$6,750.

Q. All right.

A. January 22, 1944, three cashier's checks at \$2,350 each, \$7,050.

The Court: Those checks are before the Court and the Jury here? [1250]

A. Those are the nine checks that Mr. Carroll produced.

The Court: And you had inspected those checks at the time that you had this discussion?

A. Yes.

The Court: You had knowledge of them?

A. Yes.

The Court: All right.

A. For a total of \$20,550. And then in Mr.—

The Court: And that is the very item we have here, \$20,550, that we have been discussing throughout the trial?

A. Yes, sir.

(Testimony of Seth L. Root.)

The Court: All right. Now, go ahead.

A. Then in further Mr. Ringo's handwriting:
"Goods received as follows:

"5/25/44, \$1610——"

The Court: Pardon me. Where do you get the information as to the date of arrival of the goods? From the invoices which you have referred to in your testimony?

A. Yes. I furnished him no information as to the dates of arrival, because I—we were unable to obtain from express company records the exact dates that they arrived. We had——

The Court: Do those dates reflect the dates on the invoices?

A. Yes, sir. Those are the dates on the invoices.

The Court: And you had those invoices? [1251]

A. Yes, sir.

The Court: And you received them from Mr. Blanchard?

A. Yes, sir.

The Court: And you in turn conveyed that information to Mr. Ringo?

A. To Mr. Ringo, so that it would aid him in the preparation of his work.

The Court: All right. How much is that first item?

A. May 25, 1944, \$1,610. June 8th, 1944, \$9,200. June 14th, 1944, \$690.

Then he has a note, "Balance ?\$9,050" for a total of \$20,550. That completes item 20.

(Testimony of Seth L. Root.)

The Court: What is the significance of the question mark?

A. Well, I assume Mr. Ringo—that is a question he had in his mind as to what happened to the balance there. He evidently made the assumption that——

The Court: Didn't you give him all of the invoices?

A. I gave him all the invoices that I had at that time.

The Court: Did that include the last item?

A. No, the balance is the question mark. We had no invoices for that. We had invoices just for the first three.

The Court: The first three?

A. Yes. [1252]

The Court: You did not have an invoice for the last item?

A. No, sir.

The Court: That clarifies it in my mind. It wasn't clear. And then what became of the invoices?

A. We still have them in our file.

The Court: But you could not find the last invoice?

A. No, sir. If you recall, there were some goods received earlier, January and February of 1944, but we were unable to tie them in with any records of this man Goodman back in New York, whose records were very scanty and incomplete.

(Testimony of Seth L. Root.)

The Court: Are there any further questions on this item?

Mr. Lewis: None.

The Court: Are there any further questions?

Mr. Shelton: Would Your Honor indulge me just one moment?

Q. (By Mr. Shelton): Mr. Root, I hand you two photostatic copies of documents and ask you if you had those documents during your investigation? A. Yes, I had these.

Mr. Lewis: Could I look at them?

Mr. Shelton: I want the Court to see them, too, before I proceed further, Mr. Lewis.

Mr. Lewis: Oh, these are just the invoices.

Mr. Shelton: Mr. Clerk, would you hand these to the Court? [1253]

The Court: You wish these marked?

Mr. Shelton: No, Your Honor, not at this time. I was going to ask the witness about them after Your Honor had seen them.

Mr. Drewes: May we question the witness with respect to those two documents?

The Court: What?

Mr. Drewes: May we question the witness with respect to those two documents?

The Court: Certainly.

Q. (By Mr. Shelton): Mr. Root, where did you get these photostatic copies that I have showed to you in the court here?

A. From special agent Blanchard.

Q. And do you state that these are invoices?

(Testimony of Seth L. Root.)

A. Yes.

Q. What is the error on one of them, which you referred to a moment ago?

A. I have this one invoice here dated June 8th of 1944 which shows 400 sailor suits at \$2,300. The extension is \$9,600 on the invoice, but Mr. Ringo has apparently taken upon himself to correct the extension.

Mr. Hagerty: I object to that, Your Honor.

The Court: I will strike that.

Q. Is it an error in the extension? [1254]

A. On the invoice.

Q. All right, on the invoice. How is it reflected in his report? A. He shows it as \$9,200.

Q. As the corrected item?

A. Correct extension.

Q. (By Mr. Shelton): Mr. Root, were these invoices that I have shown you included in the material which you summarized for Mr. Ringo on Exhibit 45?

Mr. Hagerty: I will object to this, Your Honor, any further questioning on these documents. They are not the originals, they are not the best evidence, and they are not in evidence.

Mr. Shelton: The Government will offer them in evidence.

Mr. Hagerty: We object to them.

The Court: They may be marked.

Q. Was this the source of your information?

A. Yes, sir.

(Testimony of Seth L. Root.)

Mr. Hagerty: They are hearsay, Your Honor.

The Court: What?

Mr. Hagerty: They are hearsay. He did not get the originals. These should have been introduced by the witness Blanchard, if they were the originals. He has been on the stand here. He says he got these from the witness [1255] Blanchard.

The Court: I am merely trying to clarify in my own mind this statement. We are dealing with photostatic copies. This gentleman that said that he gave information to Mr. Olender's former accountant upon which the former accountant predicated certain writings here. The simple question is, Did the photostats or the originals provide you with the source of information upon which you predicated the writings of Mr. Goodman?

The Witness: The photostats.

Q. These to which reference has been made?

A. Yes, sir.

Q. Did you ever at any time have the originals in your possession?

A. No, sir, they are in New York.

Q. They were in Goodman's possession, were they?

A. Yes.

Q. You photostated them?

A. I didn't photostat them.

Q. Mr. Blanchard did?

A. Those photostats, I believe, were made in New York and sent to Mr. Blanchard.

(Testimony of Seth L. Root.)

The Court: I will admit them in evidence.

Mr. Drewes: There is a certification on both documents by revenue agents.

Mr. Shelton: A special agent named Duffy, a New York [1256] special agent.

The Court: They may be marked.

(The documents referred to were thereupon received in evidence and marked U. S. Exhibit No. 66.)

Mr. Hagerty: If Your Honor please, may the record show that we object to them.

Q. (By Mr. Shelton): Mr. Root, I will ask you whether or not you ever showed the defendant Milton Olender these two photostats which have just been introduced in evidence?

A. No, sir, I don't believe so. I believe that Mr. Ringo inspected them.

The Court: Where is the third invoice? There was another invoice, wasn't there?

Mr. Shelton: Your Honor, I do not recall that there was a third one related to those two. I may be in error.

The Court: All right.

Q. (By Mr. Shelton): Will you state the dates of those two invoices, Mr. Root, and the amounts of the purchases as shown on the invoices?

A. June 8th, 1944, \$9,600.

Q. And the other one?

A. The other one, June 14th, 1944, \$690.

Q. Would you also read the price of the suits

(Testimony of Seth L. Root.)

on first the June 8th invoice and then the June 14th invoice, Mr. Root? [1257]

A. On the June 8th invoice there are 400 18-ounce suits at \$23 each.

Q. On the June 14th invoice?

A. June 14th invoice there are 30 18-ounce suits at \$23 each.

Mr. Hagerty: If Your Honor please, I am going to renew my objection and ask that everything be stricken from the record with reference to these records and that the Jury be instructed to disregard them, and the District Attorney cautioned against this conduct.

The Court: What is the basis, counsel, of your motion?

Mr. Hagerty: The basis is that it is our understanding, as gained from the case, that the inspector, Mr. Blanchard,—

The Court: Yes.

Mr. Hagerty: This man Goodman in New York became under questioning because of black market dealings.

The Court: Counsel, I know nothing about that.

Mr. Hagerty: That was involved.

Mr. Drewes: If your Honor please, it is quarter to 12. I wonder if it would be more appropriate to discuss this matter out of the presence of the Jury.

The Court: Yes, I feel in a measure I brought this matter—

(Testimony of Seth L. Root.)

Mr. Hagerty: I think the Jury should hear it, your Honor. [1258]

The Court: I can't see the reasons for any particular objection. Your associate, Mr. Lewis, sponsored that very part of the exhibit with respect to the amounts in question, the dates, and so forth.

Mr. Hagerty: That is true.

The Court: Only a moment ago.

Mr. Hagerty: That is true.

The Court: It is not clear in my mind—perhaps I am obtuse—perhaps I have had too much arithmetic in the last two weeks. It wasn't clear in my mind; I daresay the jurors' minds become befogged, and I say that respectfully. You can't sit here day in and day out without becoming case hardened to figures. It was not clear in my mind as to the source of the information, and particularly it was not clear to my mind when this witness said that he did not know whether the invoices in question referred to the Goodman transaction or not. That was in response to Mr. Lewis' questions. Yet on the other side of the controversy he said he did identify them as the Goodman invoices. Therefore I wanted some clarification in my own mind. Therefore I brought this transaction before this particular witness as he read from the statement, and I then asked him to clarify the last part thereof, wherein it appears that there is a question mark. I did not know the significance of the question mark until this very minute. Perhaps it escaped me during the trial, but here "balance, [1259] question

(Testimony of Seth L. Root.)

mark, \$9,050." I asked him if he knew the significance of that. He said that apparently was a construction of a Mr. Accountant—what is the name?

Mr. Hagerty: Ringo.

The Court: Yes. I asked him if there was an invoice in that item and he said he had not seen it. That was about the sum and substance of it. Next then is the photostatic copies are withdrawn from the Government's files. They are produced. I had not seen them before.

Mr. Hagerty: They were presented to the defendant while he was on the stand and he said he had never seen them, the originals, and he had never seen the photostats, of course.

The Court: That may well be.

Mr. Hagerty: If they were to prove this, I would feel that Mr. Goodman or someone in authority in his place should be brought here to identify them and establish that this transaction occurred.

Mr. Shelton: Your Honor will recall that the record shows the witness Goodman was ill and unable to attend, although subpoenaed.

Mr. Hagerty: This matter was under investigation for several years. In that length of time provision could have been made, either by deposition or alternates of some sort from his organization, to prove these things, if Goodman himself could not appear. [1260]

Mr. Shelton: This was a matter opened by defense counsel, as your Honor indicated, and then when it was opened, we were entitled to introduce

(Testimony of Seth L. Root.)

this further evidence as bearing on the matter introduced in evidence by the defense.

The Court: As I recall the record, Mr. Hagerty—and in intruding myself I want the jurors to know I am not reflecting on either side of this controversy, be it the defense or the prosecution; I am charged under the law as being an impartial arbiter of the law; you in turn sit there as impartial arbiters of the fact. We approach our duties and our work impartially, dispassionately, and, I hope, fairly. This, after all, is not an academic discussion. Within the last thirty minutes Mr. Lewis asked that the Court mark a certain part of this exhibit as being sponsored by him. I then stated that it made very little difference who sponsored the exhibit for the reason that the interrogation of this witness acted as an explanatory note concerning the so-called story on the merchandise purchased from Goodman. Now, the story unfolded. Then I asked the witness to read this part of the exhibit, which of course he did read. I then asked the question about the balance, and he stated that that was the reconstruction of the other accountant. Then the photostatic copies were produced. The photostats were identified by this witness.

Q. Is that correct? [1261] A. Yes.

The Court: Your objection, Mr. Hagerty, is that the photostats should be stricken from the record and that all of this testimony should be stricken as prejudicial and inflammatory?

Mr. Hagerty: Yes, your Honor.

The Court: What is the basis?

(Testimony of Seth L. Root.)

Mr. Hagerty: Our basis is this, as Mr. Blanchard testified, this investigation originated with Mr. Goodman, who was under investigation by the Federal Government. In the course of the investigation they spread out to everyone who ever had any transaction apparently with him, including this defendant. These records then presented to the defendant while he was on the stand, he under oath has said he has never seen them. He does not know them.

The Court: That was part of the defense.

Mr. Hagerty: Yes—no, under cross-examination by the Government. They were presented to us through the defendant, and, of course, we did not know what they were. The defendant said he had never seen them before. The Government is now getting them into the record by circumventing the normal and established way of introducing them into evidence. There is no one here to prove the originals. There is no one here from the organizations with the invoices to establish them in any way, and Mr. Goodman has been under investigation long [1262] before this case against this defendant was started. So provision in my mind should have been made to establish those things. They brought other men from New York. Why couldn't they have brought his auditor and book-keeper to establish the originals? Why couldn't Mr. Blanchard have been questioned about it when he was on the stand? I think the whole thing is hearsay.

(Testimony of Seth L. Root.)

The Court: I will hear you out further on both sides. The Jury is excused. We will resume at 2:30 this afternoon with the same admonition not to discuss the case under any circumstances and not to form an opinion until the matter is submitted to you.

(The Jury was excused, and the following proceedings were had in the absence of the Jury:)

The Court: Mr. Hagerty challenges the Government's position here. What is your answer to that, counsel?

Mr. Drewes: Preliminarily, your Honor will recall that very early in the trial I advised your Honor that the witness Goodman was in Miami Beach, Florida, ill. I produced a letter from a physician to that effect. He could not attend the trial. That letter was made a part of the record at the request of the Government. We are advised that the files of the George Goodman Company are in the custody of its attorney in New York. How we could establish the authenticity of his records in the absence of Mr. Goodman we are at a [1263] loss to know.

The Court: Where is the agent who made the photostat, whose legend appears on the reverse side? Where is he?

Mr. Shelton: We are not sure he is still employed by the Bureau.

(Testimony of Seth L. Root.)

The Court: Wasn't that a comparatively simple thing to determine?

Mr. Shelton: We could have determined that, your Honor. We had not expected to carry it to this point until the defense brought this transaction into issue as they have, and we thought that opened it up for us for that reason.

The Court: As I understood you, Mr. Shelton, you indicated for the record at least, that you were taken somewhat by surprise as the result of the nature of the defense asserted, is that right?

Mr. Shelton: We had not expected that this increased inventory as of December 31, 1944, would be claimed. As your Honor knows, it was only the second Thursday of the trial that we were told the defense would claim an additional \$20,550 of opening inventory and offset against net income. On the second Tuesday of the trial Mr. Lewis stated right here he was not offering the inventory evidence for the purpose of impeaching the stipulation, and it was only on the ninth day of the trial that we found that out.

The Court: That is a fairly [1264] accurate statement.

Mr. Drewes: Further, as I recall the questions and answers that were propounded to the witness Root as they pertained particularly to these two documents, he was asked if he had furnished the information to Ringo.

The Court: Yes.

Mr. Drewes: He was asked if he could identify or tie together the information shown on Exhibit

(Testimony of Seth L. Root.)

45, which he had given to Ringo, with the original Goodman transaction. He said he could not. He was asked upon what he relied in giving that information to Ringo, and he relied, as he has testified, on these two documents. I think they are admissible.

Mr. Hagerty: I am not so sure of that. Was it your Honor who asked him that?

The Court: No, Mr. Lewis asked him that specific question, and I was, I suppose, jolted out of my lethargy because I could not quite orient myself to the answer given in response to Mr. Lewis' question that he did not or could not say that the transactions in question had to do with the Goodman matter. Yet, on the other hand, the witness said in response to the Government's phase, that he did orient himself, he could assimilate it, he could point it up to the Goodman matter. If you want the record read on it, I will have it read. Am I accurate or inaccurate?

Mr. Lewis: I think you fairly stated it.

The Court: I think my analysis of how it developed was [1265] fair. I am not going to inject error into this record. We have had a long trial and I want to be extremely careful about any approach I make to these matters, because I come back to my reminder that the Court should keep himself completely removed from sponsoring or stimulating the introduction of any exhibits. I did ask this gentleman where the invoices were, did I not? And they were produced. Photostats were produced. Then

(Testimony of Seth L. Root.)

counsel for the Government indicated on the reverse side there was an agent's name. That agent had taken these photostats from the originals.

Mr. Lewis: The record shows that they were twice removed, your Honor. He got them from Blanchard, Blanchard evidently got them from some other Government agent.

The Court: May I see those, please?

Mr. Hagerty: The way we feel about it, your Honor, in the absence of the Jury, this fellow Goodman apparently was engaged in black-marketing, and when he felt he was under investigation, he made up lots of invoices apparently to try to cover his shortages. This may be some of them.

Mr. Drewes: That is a bald assumption.

Mr. Hagerty: Yes, but that is our theory of the thing, because our defendant cannot recognize him, has no knowledge of him, and certainly Mr. Goodman is under investigation.

Mr. Shelton: Your Honor, again in the absence of the Jury, the fact that this defendant kept no records might indicate [1266] that he, too, was in black marketing and that was a good reason for not keeping the records of the transaction until the end of 1945.

Mr. Hagerty: He had records.

Mr. Shelton: Not on his books.

The Court: May I ask you a couple of questions?

Q. You asked the defendant, Mr. Olender, or,

(Testimony of Seth L. Root.)

to your knowledge, Mr. Blanchard asked him for the invoices in the Goodman transaction, did you not?

A. I did not. Mr. Blanchard asked him for his dealings with Mr. Goodman.

Q. And the defendant could not or did not produce any invoices?

A. He produced one invoice that I believe he said was in substance——

Mr. Shelton: That \$1300 invoice.

The Court: I remember that.

Mr. Drewes: He has testified he had no others.

The Court: Then on cross-examination counsel confronted the defendant with the photostats and asked him if he had ever seen the originals.

Mr. Drewes: That is right.

The Court: He denied it.

Mr. Drewes: He denied it.

The Court: All right. The next event concerning the [1267] photostats is the recent event on which the Court queried this witness. The witness states that he received these photostats from another agent, that he in turn conveyed the information to the accountant then employed by Mr. Olender, and that accountant prepared, in part at least, U. S. Exhibit No. 45. Apparently Mr. J. A. Duffy compared the original with this copy, and this is a photostatic copy and Mr. Duffy is special agent.

Mr. Shelton: Special agent or former special agent in New York, according to my understanding, your Honor.

(Testimony of Seth L. Root.)

The Court: Where did you get the item of \$1,610, Mr. Witness?

A. I believe there is another invoice somewhere in our file. Is that the one that is missing?

Q. Yes, 5/25/44.

A. I believe there is another invoice back there.

Q. There must be. That would leave open only the item of \$9,050, which is a reconstructed item.

The Witness: During a time subsequent to this we received other invoices which we were able to tie in with express receipts.

Mr. Drewes: I believe we have it here, Mr. Root. Will you see if that is the one you referred to?

The Witness: No.

Mr. Drewes: Isn't there a correction on there for [1268] commission making up the \$70 commission? Item 1610.

The Witness: May 25th, that first one, your Honor. That would be this one.

Mr. Drewes: I believe that the document the witness has in his hand now, your Honor, is the missing invoice.

Mr. Shelton: Pass it up to the Court, Mr. Root.

The Court: This apparently was a transaction from Seagoing to Goodman and Goodman in turn shipped to Olender.

The Witness: That is where Mr. Goodman was buying his suits from Seagoing Uniform.

The Court: Did Goodman take a small profit on the transaction?

The Witness: That is our information, that he

(Testimony of Seth L. Root.)

turned them over for a small commission.

Mr. Hagerty: The testimony of the defendant was Leavy got a dollar and Goodman got a dollar acting as the agent.

The Court: What is your view of the state of the record as it now appears before the Court?

Mr. Drewes: My view is simply this: The gist of the matter, from a evidentiary point of view, is the source upon which the witness, Mr. Root, relied in giving the information which he did to Mr. Ringo, all of which was brought into the record by Mr. Lewis. The question was asked of him, could you identify or tie in the information which you gave to Mr. Ringo to the original Goodman transaction, and [1269] he said no, he could not. Why not? The answer is the documents the Government has since produced in evidence.

The Court: Why couldn't you tie these in to the Goodman transaction?

The Witness: We just have no records to support that they were part of it, and there might have been other orders. We have several other invoices, the express receipts, showing the receipt of goods from Goodman also, and they just don't tie in entirely with this \$20,550.

Mr. Drewes: There is also the date again, is there not, Mr. Root? These are June invoices.

The Witness: Yes, they extend from January clear through to June. In fact, the invoices show more money than the \$20,000.

The Court: If you notice on one of the invoices

(Testimony of Seth L. Root.)

there is a marking, "30 suits will follow." Then "This completes order." What significance do you attach to that?

The Witness: He evidently had put in an order for a certain number of sailor suits and this notation is that he completed the order.

The Court: Then if you follow that down you find 30 suits is the next item, and you have incorporated that in the other memorandum there as the third item, haven't you? Thirty suits represent the third item on that sheet.

The Witness: Yes. The thing that is put on here, was [1270] put on here by Mr. Ringo, and furnished the——

The Court: I may be obtuse. The thing I cannot clarify in my mind is how—if you cannot correlate these transactions perfectly, in the light of the photostats and the invoices, and in the light of all the facts as we know them in the Goodman transaction, how could you at that time tell this accountant that these items were part and parcel of the Goodman transactions?

The Witness: I did not tell him that they were part and parcel of the Goodman transaction, your Honor.

The Court: What have you got there?

The Witness: I put down that we had certain invoices from George Goodman to aid him in possibly refreshing Mr. Olender's memory on this. We do not know.

(Testimony of Seth L. Root.)

The Court: And then he assumed to put them under the legend, "Story of Goodman transaction."

The Witness: Yes. This is something that he has worked out himself.

Mr. Shelton: If your Honor please, bearing on your question about whether these tie in, the record will show, it is my recollection, that the defendant justified that many of these suits, if not most, were received in February and March, after the January order, which would be an indication that the shipments were not received as late as June or at least some indication. [1271]

The Court: Gentlemen of the prosecution, if this witness cannot correlate the invoices with the Goodman transaction, that is, the \$20,550 item, how would the Court be justified in permitting these invoices to go to the Jury?

Mr. Drewes: It is our theory of the case that there were other unreported sales.

The Court: What?

Mr. Drewes: There were other unreported purchases from George Goodman.

Mr. Shelton: The Government is entitled to disprove the defense contention if it can. We view these invoices as some evidence that the defense contention in this matter has no merit.

Mr. Hagerty: If the Court please, there is a proper way of doing that, that is, to identify the originals from Mr. Goodman himself or from the man in his office that made the originals and made the shipment.

(Testimony of Seth L. Root.)

The Court: The man in the office may not be available. The agent may be available.

Mr. Hagerty: Or Mr. Goodman. His deposition could be taken.

Mr. Drewes: The question before the Court is whether the two documents are admissible evidence under the circumstances under which the offer was made. Mr. Lewis opened up the question, and it follows from that, upon what did you rely [1272] in giving this information to Mr. Ringo? Secondly, how do you know that they were not tied in to the original \$20,000 purchase? The answer is, I had in my possession other invoices that I could not identify, could not tie into. That is the issue.

The Court: We are dealing with secondary evidence, photostats.

Mr. Drewes: There is no question about that.

Mr. Hagerty: Our position was pretty well established in Court as to the theory. The theory of, the theory of exchanges that Government counsel went into when Mr. Blanchard took the stand.

Mr. Drewes: Mr. Blanchard can't add anything to the matter.

The Court: In view of the present state of the record, I will mark them for identification. It was not counsel on either side; it was the Court who asked for these invoices. Have you made any determination as to where Duffy is?

Mr. Shelton: No, your Honor.

The Court: How long would it take you to do that?

(Testimony of Seth L. Root.)

Mr. Shelton: We could send a teletype and find out if he is still employed there. If not, they have his address. I might respectfully say to your Honor in that connection the Government expects to call only one witness after Mr. Root and he is a very short witness. If we find Mr. Duffy was [1273] available, it would mean his coming out by train or plane if he were to come.

The Court: Mark them for identification, presently, gentlemen. I will give further thought to the matter.

(U. S. Exhibit 66 was thereupon marked for identification only.)

Mr. Shelton: Your Honor, while we are out of the presence of the Jury, may we show you some other invoices here which the agent tells me represent January and February deliveries?

The Court: Can you have an independent check made on Goodman to determine the state of his health? Did you accept their doctor's statement as to the state of his health?

Mr. Shelton: No, we had further correspondence, your Honor, when this became quite important. We got the special agent's office to send a telegram to Miami, and the report received was that Mr. Goodman was receiving adrenalin. He was down to a weight of somewhere around 100 pounds, as I recall it, and the indication was that he was very seriously ill.

(Testimony of Seth L. Root.)

Mr. Hagerty: As a result of that you got this letter back from the doctor?

Mr. Shelton: The letter came from the doctor first early in the trial, before the trial began. We issued the subpoena and got the doctor's letter. At a later time in the [1274] trial we had the special agent's office in Miami in contact with us and they came back with the report about the adrenalin and the loss of weight.

The Court: These are shipping tags.

Mr Shelton: Yes, your Honor.

The Court: I will rule on it later. We will resume at 2:30.

(Thereupon an adjournment was taken until 2:30 p.m. this date.)

October 7, 1952, 2:30 P.M

(The following proceedings were had outside the presence of the Jury:)

The Court: Gentlemen, in connection with our discussion preceding the noon hour, and with particular regard to the admissibility of the photostatic copies of the invoices in question, I have had the benefit of some relaxed moments and also have had occasion to review the authorities as well as look upon the evidence thus far as it has unfolded as well as the testimony of the gentlemen on the stand, and I believe that under the circumstances, as the records are now posed before me, that they are inadmissible.

(Testimony of Seth L. Root.)

Accordingly I sustain the objection interposed, and they may be marked for identification.

Mr. Hagerty: At the same time then we will renew our motion to strike from the record the testimony relating to them and ask that the Jury be instructed to disregard same.

The Court: Well now, on that point, the admissibility of the photostatic copies of the invoices, in my opinion at least, is not so interwoven with the testimony of this witness, with this gentleman that it would warrant the Court in striking from the record the testimony of this man. The agent testifies—pardon me, your name——

The Witness: Root. [1276]

The Court: Mr. Root, the agent, testifies that as to the photostatic copies he cannot tell to a certainty and under oath that they bear strictly upon the Goodman transaction. Now he has answered that in response to cross-examination on the part of Mr. Lewis, and he answered it as well as in response to a question I directed to him, and that in part at least is one of the reasons why I am not admitting the documents in evidence. That is one of the reasons.

Mr. Hagerty: Your Honor——

The Court: Mr. Hagerty, if you will permit me. The record as it now has unfolded is of that character wherein, again we come to credibility, do the jurors believe that the Goodman transaction is as it has been delineated by the defendant. This gentle-

(Testimony of Seth L. Root.)

man cannot state categorically and under oath that the invoices bore upon the Goodman transaction. All he can testify to is that he turned over such information as he had to the accountant for the defendant and the accountant for the defendant attempted to reconstruct the matter. That is about the best there is.

Now that being so, I think it would be an abuse of my discretion if I allowed the invoices in.

But at the same time the testimony of this witness is before the Jury and the Court for whatever it is worth as to the related facts because they were brought out by [1277] Mr. Lewis and, if you will examine the record, and I am quite sure the record will bear me out, Mr. Lewis asked him the question in cross-examination or on direct examination, whatever it may have been: "Can you determine precisely that these invoices bore upon the transaction?" He said, "No."

It was then that I perhaps wittingly or unwittingly groped for the invoices and it was then that they came out of the Government's file, and under the circumstances I don't believe there is anything to strike from the record.

There is only one question posed before me and that is the prime one, that is, the admissibility of these invoices.

Mr. Hagerty: As I recall it, your Honor, Government counsel, Mr. Shelton, asked him: "Can you tie these in—indicated deliveries of goods—in

(Testimony of Seth L. Root.)

with the Goodman transactions as testified to by the defendant?" He said, no, he couldn't.

The Court: He said, no.

Mr. Hagerty: Then Mr. Lewis asked him:

"Can you say that they are not connected with it?" And he said, "No, I can't." So then Mr. Shelton brought forward, started his examination of his own witness in reference to the photostat and started testifying to and from data on the photostat. That is the part I want stricken.

The Court: Which data is correlated with 51—is that [1278] the Exhibit number?

Mr. Hagerty: 45.

The Court: With No. 45, which is in evidence. Now, if 45 had not been in evidence, there might be something to strike. But as I view the record, there is nothing to strike from the record. That is in the evidence and it was Mr. Lewis who brought out the relationship between the invoices and the latter part of that exhibit, which you hold in your hand, which is number——

Mr. Hagerty: Mr. Lewis in so many words never mentioned the invoices. He simply responded on cross-examination to a question directed by Mr. Shelton. Mr. Shelton said:

"Can you tie this transaction into the Goodman transaction?"

He said, "No." Mr. Lewis said:

"Can you say it was not connected with the Goodman transaction?"

He said, "No."

(Testimony of Seth L. Root.)

The Court: But, Mr. Hagerty, you may recall that basically and underlying this surface discussion there was the prime predicate of the invoices. Isn't that correct, Mr. Witness?

The Witness: Yes.

The Court: Isn't that what we were discussing, the invoices? [1279]

The Witness: Yes, sir.

The Court: And it was then that perhaps, in a zeal to bring before the Court and the Jury all of the facts, that I brought out the photostatic copies of the invoices. Now those invoices had been presented to the defendant. He denied categorically that they bore upon any transaction which he recalled. They are vagrant documents, in my opinion, and have no place in the record. But there is nothing to strike from the record as the evidence unfolded, and that is my ruling.

Mr. Drewes: If your Honor please, I have an amended supplemental instruction which I will ask your Honor——

The Court: I will add one thought, Mr. Hagerty, in point of fairness to you and the Government as well. If after a review of this record this evening you feel that there are specific parts of the narrative that unfolded that should be stricken, I will entertain a motion in the morning. I can't certainly collect the record now as it appears. Similarly, to the Government, if there is any error, any prejudice that might have crept in as a result of what I did,

(Testimony of Seth L. Root.)

I am willing to strike it, but I think thus far there isn't.

Mr. Hagerty: That will be most fair, your Honor.

The Court: Will you call the Jurors in?

Have you submitted a copy of the supplemental instruction [1280] to the opposition?

Mr. Drewes: Yes.

The Court: This is a better phrasing. I will go over it at my convenience.

(The following proceedings were had in the presence of the Jury:)

The Court: You may proceed, gentlemen.

Mr. Shelton: If your Honor please, the Government has no further questions of Mr. Root.

Mr. Lewis: No further questions.

Mr. Shelton: You may come down, Mr. Root.

(Witness excused.)

Mr. Shelton: Mr. Mytinger, will you take the stand, please?

HUBERT C. MYTINGER

recalled on behalf of the Government, previously sworn.

The Clerk: Mr. Mytinger, will you please restate your name for the record?

A. Hubert C. Mytinger.

Direct Examination

By Mr. Shelton:

Q. Mr. Mytinger, you have appeared previously and have testified you are a certified public accountant? A. I have.

Q. And you were in Court this morning when Mr. Carroll of the [1281] Bank of America produced the two loan application records which are here on the blackboard? A. Yes.

Q. I will ask you, Mr. Mytinger, to take defendant's Schedule 4 as revised and to compute from the figures appearing there the amount of cash that the defendant claims was in his safe deposit box on July 11, 1945?

A. The nearest date that appears on schedule 4, as I believe it is known, is June the 9th.

The next date is August the 27th.

As of June the 10th——

The Court: Pardon me, Mr. Shelton. The jurors are looking at the records. You might give them an opportunity to find that. Do you all have

(Testimony of Hubert C. Mytinger.)

that schedule now? Schedule 4, is it—is that the number? A. Yes.

The Court: You are reading from a note of June 9th, the notation?

A. The last entry, June 9th, and then the next is August 27.

Q. (By Mr. Shelton): Now, Mr. Mytinger, in that computation made from the defendant's schedule, I would like to have you allow for the withdrawals shown as of June 9th, but not for the withdrawal as of August 27, and compute the balance in the intervening period which would cover July 11, 1945? [1282]

A. The balance would be \$61,347.43.

The Court: What does that figure represent now?

A. The balance of cash in safe deposit box after the withdrawal of June 9.

The Court: According to Schedule 4?

A. That's correct.

The Court: And you get that in juxtaposition to July 11, 1945?

A. That is the indicated——

The Court: ——wherein allegedly a loan was made?

A. Yes.

The Court: By the bank?

A. Yes.

Q. (By Mr. Shelton): Now, Mr. Mytinger, I would like to have the same computations made for August 22, 1946, on two assumptions. First I will

(Testimony of Hubert C. Mytinger.)

ask you to assume that there is not in evidence in this case the I. Magnin and Gray Shop items down at the bottom of the page, which I believe the record will show his Honor struck, and for the purpose of the first computation I would like to have you assume that the item near the bottom of the page, "Non-deductible expenditures included in stipulation" of \$1340.40 represents money which was expended from the box prior to August 22, 1946, and I will ask you to compute the cash in the box as of the defendant's schedule on that date on that assumption. [1283]

A. Again, the last entry is July the 10th. The next entry is September 18th. So between those two dates—making the assumptions as you have given them—there would be a balance of cash of \$17,939.76.

Q. Now, Mr. Mytinger, I will ask you to make the same assumptions as before, except to assume that the non-deductible expenditure item of \$1340.40 was expended after August the 22nd, 1946. Will you give me a similar cash figure derived from defendant's Schedule?

A. The cash figure would then be \$19,280.16.

Q. \$19,280.16? A. Correct.

Q. Assuming that the net worth method is being used to compute taxable net income, Mr. Mytinger, and assuming that the defendant kept no records of cash going into or coming out of the safe deposit box and assuming further that the defendant had at

(Testimony of Hubert C. Mytinger.)

least five known sources of taxable income, is it in your opinion correct procedure for an accountant for the defendant to limit the sources from which cash was received without proper verification of possible sources of cash and the amounts of cash coming therefrom?

A. I didn't understand the last part of your question, Mr. Shelton. What is the question?

The Court: I think if you will just strike the amount of "cash coming therefrom." That confuses the last part. [1284]

Mr. Shelton: Let me restate it, your Honor.

Q. Assuming that the net worth method is being used to compute taxable net income, Mr. Mytinger, and assuming that the defendant kept no record of cash going into or coming out of the safe deposit box, and assuming further that the defendant had at least five known sources of taxable income, is it in your opinion correct procedure for an accountant for the defendant to limit the sources from which cash was received without possible verification—without proper verification of possible sources of cash? A. My answer would be no. [1285]

Mr. Lewis: Your Honor, I would like to have that stricken because without "proper verification" I don't know what that means.

The Court: Overruled. We have had definitions of "verification" in the record. Is that the definition upon which you base your question?

Mr. Shelton: Yes, your Honor. The definition worded by the accountant for the word verify.

(Testimony of Hubert C. Mytinger.)

The Court: All right.

Q. (By Mr. Shelton): Assuming, Mr. Mytinger, that no record was kept by the defendant of amounts deposited in and withdrawn from his safe deposit box and assuming further that the defendant had at least five sources of taxable income, and assuming that complete records of the disposition of his income from all sources have not been kept and assuming that there is evidence that the defendant's business records do not reflect all his sales, and assuming that money was withdrawn from the defendant's business and used for business and other purposes without any indication on his records of the purposes for which the money was used, would it in your opinion be sound accounting practice to assume that all unidentified or unreported deposits or expenditures of cash by the defendant came only from his safe deposit box? [1286]

Mr. Hagerty: We will object to the question, your Honor, on the ground that it assumes certain facts not in evidence. There is evidence here that the defendant kept records of his business, kept records of his transactions, and this is an attempt to usurp and evade the province of the jury. That is a question for the jury to decide.

The Court: Overruled.

A. My answer would be no.

Mr. Shelton: You may examine.

(Testimony of Hubert C. Mytinger.)

Cross-Examination

By Mr. Lewis:

Q. Mr. Mytinger, as a certified public accountant with years of experience with the Bureau of Internal Revenue, did you ever see where the in and out records of a cash deposit box were not kept on a daily basis, did you ever see it verified.

A. Do I understand you to ask, did I ever see such a record kept or do I know of cases where it was not kept?

Q. Do you know of cases where it was not kept?

A. Oh, yes.

Q. Has the Government in any of those cases ever been able to verify **on its own**?

A. I would say yes, sir, in some cases, Mr. Lewis.

Q. You mean that you could verify the amounts when no records were kept going in and out of the A-box? A. That's correct. [1287]

Q. How?

A. Well, it would depend upon the case. If the source was limited to relatively few sources, one or two, and third party records were available, and the same transactions were handled in the same manner, and merely the proceeds put in the safe deposit box, it would be a very simple matter then to verify it.

Q. Will you name the sources that the Government in its investigation from which Mr. Olender

(Testimony of Hubert C. Mytinger.)

received income during the years 1944, 45 and 46?

A. Yes. There is the Army and Navy Store, dividends, interest, partnerships, sales property. There may be others, but those five, I believe——

Q. Those are the one you know of?

A. That's right.

Q. Now, why would it be simpler if there were only one or two sources to verify than when you have four or five sources?

A. It would be simpler in the process of verification, Mr. Lewis. There would be fewer sources from the outside to examine perhaps, fewer possibilities of funneling off other than to this one box.

Q. Well, when you analyze this, the evidence in this case, there are not very many complex sources, are there?

A. I would say that is a matter of degree. There are some [1288] of them so complex that I don't believe the answer has been reached in court as to what happened to the funds.

Q. How many cases have you ever been on in all your years where no daily records, actual records, were kept, were you able to verify each and every withdrawal or most of them from a safety box?

A. Again now to what extent?

Q. To verify in the sense that an accountant— You were discussing sound accounting practice. Where you could certify that it happened that way.

A. My actions as an accountant for the Government in such investigations, Mr. Lewis, would not be the same, so far as responsibility is concerned,

(Testimony of Hubert C. Mytinger.)

that would be expected of an accountant. The Government, for instance, has the benefit of the burden, as you well know, in civil tax matters. So in a great many such investigations if we found no adequate record, the taxpayer would be charged with everything that we did have knowledge of and the burden would be upon him to prove it was not income.

Q. That is in a civil tax case?

A. That's correct.

Q. But that is not true in a criminal tax case?

A. No. As I told you, I believe yesterday, I made no verification in this case. The audit in this case was done [1289] by two other agents.

Mr. Lewis: That is all.

Redirect Examination

By Mr. Shelton:

Q. Mr. Mytinger, I believe you answered in response to a question by Mr. Lewis that you do not believe the answers have been received into court as to disposition of all funds accounted for, or words to that effect. Were you referring to the defendant's schedule 4? A. Yes.

Mr. Hagerty: Objected to as being leading and suggestive and again an attempt on the part of the counsel to summarize the witness' testimony. He summarizes his testimony and then puts words right in his mouth and asks him if that is what he meant. It is argumentative in form.

(Testimony of Hubert C. Mytinger.)

Q. (By Mr. Shelton): Will you state whether or not you were referring to schedule 4, Mr. Mytinger? A. In part.

Q. Would you be able to give some illustrations of the statement which you made on cross-examination to Mr. Lewis?

A. Yes. I recall Mr. Hellman's testimony, I believe, where he admitted that the items such as dividends and interest could have been considered as making up part of the deposits appearing on schedule 4. Likewise, I recall, [1290] only the defendant's testimony, that the amounts from the partnership in Fresno arrived in January of each year; it is possible that those items likewise might have been received at other times. Mr. Carroll's testimony this morning, I believe, tied a business check in with the \$15,000 withdrawal shown on schedule 4 with the purchase of four cashier's checks rather than cash from the vault.

Q. Mr. Mytinger, I will ask you whether or not in what you just said you were referring to defendant's Exhibit AD (AQ)?

A. Well, I didn't see this Exhibit at the time it was handed to Mr. Carroll, but I presume this is the check. It is the only one I have knowledge of coming in this morning.

Q. It is a \$15,000 check dated when, Mr. Mytinger? A. Dated May 24, 1945.

Q. And if the records should show that that check was introduced by the defendant this morn-

(Testimony of Hubert C. Mytinger.)

ing, by his counsel, would you then say that that is the check to which you referred?

A. Yes, I believe it also shows in the business record, in Defendant's records.

Q. Can you state in what respect you think this check illustrates what you just stated, Mr. Mytinger?

A. Well, we mentioned as possible sources certain possible [1291] taxable sources. Also accounting for some of the funds which may have been deposited in a personal account or may have been used for other expenditures, would come such funds as were withdrawn from business for personal use. This, I believe from the evidence now before us, is a personal withdrawal of the business and so recorded on the defendant's books. I believe Mr. Carroll further testified, and I believe the evidence will show, that that check is tied in with the purchase of the four cashier's checks on May 31, 1945.

Q. I will show you Government's Exhibit 63 and ask you whether or not that Exhibit includes the four cashier's checks that you just referred to?

A. Yes, it includes three others too.

Q. But it does——

A. It includes the four.

Q. It does include the four? A. Yes.

Mr. Shelton: You may examine.

(Testimony of Hubert C. Mytinger.)

Recross-Examination

By Mr. Lewis:

Q. Mr. Mytinger, I show you United States Exhibit 58, a deposit on June 1, 1945, and the Defendant's Exhibit number AC showing a deposit into the bank account of \$15,000, June 1, 1945, and United States Exhibit Number 64, cashier's check for \$15,833.46.

Now will you analyze those Exhibits and tell me where [1292] in your opinion the money came from for each one of them?

A. Well, starting with the first item, Mr. Lewis, U. S. Exhibit number 58, merely shows a deposit of currency in the Bank of America on June 1, 1945, \$15,000. It does not disclose the source of the currency.

On Defendant's Exhibit AC in very dim pencil notation there is a handwritten notation "Store check number 2396" or "3296"—"May 24th" opposite the deposit. However, I believe Mr. Carroll this morning explained that that store check went to buy four cashier's checks.

Q. Well, it is not possible that the store check could go to buy the cashier's checks and that the \$15,000 to the commercial account on 6/1/45 was cash from the box to buy the insurance cashier's check, U. S. Exhibit 64?

A. If there were cash in the box and if it were taken out on that date and deposited, I would say

(Testimony of Hubert C. Mytinger.)

it is possible this is the deposit. But I don't recall any specific testimony or evidence of that nature.

Q. But didn't Mr. Olender testify that the money that was not withdrawn through personal checks or store checks came from the box?

A. I believe he did, yes.

Mr. Lewis: That is all, your Honor.

Further Redirect Examination

By Mr. Shelton:

Q. Mr. Mytinger, do you have with you a copy of the defendant's schedule 4 as revised? [1293]

A. I believe this is the revised schedule.

Mr. Shelton: Mr. Clerk, do you have the number of that?

A. Defendant's Exhibit AK, I believe.

Q. (By Mr. Shelton): Mr. Mytinger, I hand you Defendant's Exhibit AK, which is schedule 4 of the defense's theory. I will ask you to direct your attention to May 31, 1945 and ask you whether or not there does not appear under that date four cashier's checks, the total amount being \$15,000?

A. There does. Those are the four checks that I previously testified to.

Q. And this schedule was prepared to reflect, was it not, that the amounts in the withdrawal column here represent money coming out of the safe deposit box and going into other forms?

A. That is my understanding.

Q. And from the evidence in this case, that is,

(Testimony of Hubert C. Mytinger.)

the documentary exhibits, will you state to the Court and the jury whether or not in your opinion the documentary evidence establishes that these four cashier's checks were purchased with money from defendant's safe deposit box?

Mr. Hagerty: Object to, your Honor, unless the Exhibits are specifically identified.

Mr. Shelton: I will invite your attention, Mr. Mytinger, [1294] to Defendant's Exhibit AD, (AQ) which you had a little while ago. Do you still have it?

A. No, I haven't.

Q. You do have it? A. I haven't.

Mr. Shelton: Your Honor, I took this to be a "D" before. May the record show that it is Exhibit AQ?

Q. Inviting your attention, Mr. Mytinger, to Defendant's Exhibit AQ, and to Government Exhibit 63. I will ask you whether or not it is indicated that \$15,000 used to purchase those four cashier's checks came from the defendant's safe deposit box?

A. The documentary evidence of itself does not so indicate, Mr. Shelton. However, Mr. Carroll testified, I believe, that the markings on the check indicated that it was a collection item which in his opinion represented the offset for the purchase price of these four cashier's checks.

Q. Well, based then on the documentary evidence and on Mr. Carroll's testimony, is it your conclusion that these four cashier's checks were

(Testimony of Hubert C. Mytinger.)

purchased with the check which is Defendant's Exhibit AQ?

A. Based solely on this evidence and that testimony, I would say yes.

Q. And if then the check was used to purchase those four [1295] cashier's checks, they were not purchased with money coming from the defendant's safe deposit box, were they?

A. That is correct.

Mr. Shelton: You may examine.

Mr. Lewis: No further questions.

Mr. Shelton: You may come down, Mr. Mytinger.

(Witness excused.)

Mr. Drewes: If your Honor please, there have heretofore been offered into evidence and marked for identification by the Government the 1945 partnerships return of the Fresno partnership, the 1946 partnership return of the Fresno partnership, the affidavit of Milton Olender filed in connection with the estate of his father, and the sworn statement of Milton Olender given before Bedford E. Blanchard.

At this time we ask that those four documents be admitted into evidence.

The Court: May I have the sworn statement before Blanchard?

Mr. Drewes: That is number 48, according to this record.

The Court: As to the other documents, the partnership returns and the like, I think that they may be admitted.

As to the interrogation before Mr. Blanchard, I

had it marked for identification. There were certain interpolations [1296] on the face of the document, as I recall, and it was never signed by the defendant.

Mr. Hagerty: It was never signed.

The Court: Do you have an objection at this time?

Mr. Hagerty: Yes, we object to it, your Honor.

The Court: The objection is sustained.

The other documents may be marked in evidence.

Mr. Drewes: I should be very reluctant to bring the Bureau stenographer over to testify from her notes taken at that time. I wonder if counsel might reconsider?

Mr. Hagerty: Well, there are definite interpolations pasted on.

The Court: There were such additions, counsel, as would prompt the court in requiring a basic foundation to be laid. There are additions to it in terms of paper cut out and added.

Mr. Hagerty: There were certain statements questioning the defendant which are in the record.

The Court: Mr. Shelton queried the witness on the stand. He elicited in response to those questions what I believe to be the crux of his examination.

Mr. Drewes: That is in the record, your Honor. We will withdraw the offer.

The Clerk: What are the numbers of those documents?

Mr. Drewes: The partnership return for 1945 is 13, 46 [1297] is 20, the affidavit is unmarked.

The Court: This marks the end of the evidence, I take it.

Mr. Drewes: The Government will rest, your Honor.

Mr. Hagerty: We have one more witness, your Honor, in rebuttal.

The Court: Will you call the witness as we go along?

Mr. Hagerty: But for the purpose of the record, on behalf of the defendant we would object to the admission into evidence of the affidavit executed by the defendant. I don't know what the number is—in connection with his father's estate.

The Court: The objection is overruled.

Mr. Hagerty: I don't know what the number of the Exhibit is.

The Court: Will you present your next witness, please?

Mr. Hagerty: Yes.

Mr. Lewis: Mr. Hellman.

ROLAND HELLMAN

recalled as a witness for the defendant, having been previously sworn, was examined and testified further as follows:

The Clerk: Please restate your name for the record.

A. Mr. Roland Hellman. [1298]

Direct Examination

By Mr. Lewis:

Q. Mr. Hellman, will you take schedule 4? Drawing particularly attention to the May 31 items, 1945, "purchased cashier's checks, Bank of America, 90-1, \$3,000"; another \$3,500 item, another \$3,500 item, and a \$5,000 item.

Have you those Exhibits? A. Yes.

Q. You heard Mr. Mytinger's testimony here?

A. Yes.

Q. As a public accountant and former revenue agent will you explain that transaction to the jury and also the transaction of the check, explain to us what effect from an accounting viewpoint matters testified to by Mr. Mytinger would have on schedule 4?

A. Well, in view of Mr. Carroll's testimony this morning and Mr. Mytinger was correct in as far as he went but he didn't cover the—he went—he covered this phase here and did not explain the result of the questions you asked him previously. In view of Mr. Carroll's testimony and his identification of

(Testimony of Roland Hellman.)

the mark on the checks, the four cashier's checks were purchased then with proceeds from the store check 2396 which is in evidence here, Exhibit A Q. It was issued May 24, 1945, and cashed on June 1st, or exchanged on June 1st for these cashier's checks. However, this Exhibit, Government's [1299] Exhibit 58 showing a deposit of \$15,000 on the same date, June 1st, into Mr. Olender's personal commercial account, the purpose of which is clearly evident, to buy cashier's checks U. S. Exhibit 64 to purchase life insurance \$15,833.46, which was covered by the stipulation as far as the asset was concerned. That is related inasmuch as in working up this schedule we knew there were the two \$15,000 items, and schedule 4, to the extent that it detailed the four cashier's checks as having been purchased from the safe deposit funds, is incorrect but would also be incorrect then to the extent that it fails to take into consideration a transfer of \$15,000, presumably from cash in the safe deposit box, into the personal bank account from which he purchased the life insurance. So it is a wash transaction. One \$15,000 item comes out; the other \$15,000 item goes in. So it washes out entirely.

Mr. Lewis: That is all.

The Clerk: U. S. Exhibits 13, 20 and 25 heretofore marked for identification now in evidence.

(Thereupon the exhibits formerly marked U. S. Exhibits 13, 20 and 25 for identification were admitted in evidence and marked U. S. Exhibits 13, 20 and 25 respectively.)

(Testimony of Roland Hellman.)

Cross-Examination

By Mr. Shelton:

Q. Mr. Hellman, how many corrections have you made to schedule 4 since it was originally shown to [1300] the jury in its unrevised form?

A. Well, the very original schedule 4 was changed before we submitted it to the jury.

Q. I asked you how many times the figures on that original schedule 4 have been changed from the first moment that the jury saw it until now?

A. We haven't made any actual official changes on it yet. There are several changes which I explained previously probably would come about, because we are still groping till we find the right answer here.

Q. You are quibbling with me, Mr. Witness. But how many changes have you made or should have been made on that schedule?

A. Well, this one we are just talking about, would be a substitution. There would be no change in dollars. That is one. The Gray and Magnon items at the bottom, the Judge stated he will pass that item. There has been no definite ruling, whereas you said there was and he said he passed that item. It is not ruled on yet. So that is a possible change, so it is not changed yet.

The Court: What is that, \$1603?

A. The bottom item, your Honor, non-deductible expenditures admitted in evidence, I. Magnin for \$863.73, Gray Shop for \$1391.01. We started an

(Testimony of Roland Hellman.)

argument on that the other morning. You said "We will pass that." [1301]

The Court: What is the total?

A. \$2,254.74. We haven't had a final answer on that as to just which way to handle it. Those are the—that possible change in these items we were just discussing—those are the changes in the items that I have on schedule four before me. However, we had on this original schedule 4, in which we added the Fresno items and the—as additions to the safe deposit box, and these other three items on the Olender-Elkus bank account we added those.

Q. (By Mr. Shelton): Would that make a total of five, Mr. Hellman?

A. Well, the Olender-Elkus—really three changes—would be considered as one. They were all related to one transaction, which was overlooked—admittedly overlooked and we found the error and we willingly put it in. It was not trying to—it belonged in there and we put it in there. The same thing with the Fresno partnership, that information came out later. This schedule was prepared while the jury—while the trial was in process, you know, Mr. Shelton. We are trying to keep this thing as correct as we can.

Q. I will ask you if your recollection isn't wrong in one respect, that the Magnin and other expenditure at the bottom of this page were stricken out and then Mr. Lewis raised the question about those same items as expenditures [1302] on the expendi-

(Testimony of Roland Hellman.)

ture part of the schedule and it was then that the Court said he would pass it, is that correct?

A. That is possibly correct. I couldn't be certain without having reference to the transcript on it. But my point is this, Mr. Shelton, that if you are going to deny him——

Mr. Shelton: Your Honor, the remainder of this is argumentative. I think he has answered the question.

You may examine.

Mr. Lewis: No further questions.

Mr. Shelton: You may come down, Mr. Hellman.

(Witness excused.)

The Court: The evidence is closed?

Mr. Drewes: The Government rests.

Mr. Lewis: Yes, your Honor.

The Court: Ladies and gentlemen of the jury, the evidence in this case has now been closed. The Government has submitted its case on the evidence, and the defendant. They have called their witnesses and the witnesses have been subject to examination before you. The balance of the case entails the arguments of the counsel, the instructions of the court. We have covered a rather extensive field of evidentiary matter, including a great deal of arithmetical computation and statements and the like.

The relevancy and materiality of much of the matter will be particularly pointed out to you during the course [1303] of the argument. The arguments in a case like this are very helpful not only

to you but as well to the Court. It is impossible for the ordinary mind, and we all have ordinary minds, to comprehend the full impact of evidence until such time as it thoroughly unfolds and until such time as it has finally been sifted and resifted and much of what appeared to be, and still appears to be perhaps, of a general sense become more concrete as the arguments fit into the general mosaic, the pattern of the case.

Particularly in a case involving so-called net worth theory it has been my experience that until the last of the case is in, whether it is on the part of the defense or the prosecution, it is difficult to comprehend the full impact. I have had that experience in cases that took much longer than this, wherein the net worth theory was involved.

And I appreciate your patience involved. I noticed that during the course of the unfolding of the testimony you were extremely patient and considerate and painstaking in going over the Exhibits. I recognize that you ladies and gentlemen are not accountants, you aren't trained as accountants, perhaps only in the sense that you have the ordinary routine education that people get in accountancy in the grade schools as well as high school.

This case involves expert testimony. I will instruct you [1304] hereafter as to the experts, and I might add now somewhat parenthetically as to the expert testimony you are to view the experts the same as you would any other witness. They come before you and they are subject to examination and cross-examination. They are men skilled in their

art and in their science and in their profession and each expert unfolded to you the reasons underlying his conclusions. You are to examine the reasons underlying the conclusions each reaches in the light and in the searching light of the truth and the cross-examination conducted.

Counsel for the Government will have an opportunity to open the case.

I think it has reached the point now where it perhaps it would better serve if we started the arguments in the morning.

I have one or two items to discuss with counsel in your absence and we might be perhaps more receptive in the morning at 10 o'clock than we would be now to launch into extensive arguments.

I expect counsel on both sides to argue this case fully and, of course, fairly and completely to the end that every facet may be covered. I expect that there will be no limitation on the arguments. I haven't imposed any limitations in the past in this type of case and I am not going to do it in this. We have the next succeeding [1305] three days to complete the case and not having rushed it in its earlier stages, I am not going to undertake to rush it now. I perhaps labored under the impression, and I think it is a safe one, that the reception of a case of this character is like any other matter involving a subject that is not altogether familiar to us, we should take it more or less in stride. The human mind can only assimilate only so much during a given period of time and hence we have tried it as casually and I suppose as sincerely as we might be able to.

So, accordingly, at 10 o'clock in the morning, we will resume the case. At that time the Government will open its arguments. The defense will present its view or views and the Government has the right to close the arguments.

With respect to oral arguments, counsel on either side is entitled, and they are entitled to present to you the case from their most persuasive view and from their particular position that they occupy.

Naturally there is partisanship in the presentation of a case. Although it is often said that the Government presents a case to the end that all of the truth be exposed, I suppose in the human element there is bound to be a certain amount of partisanship one way or the other. Although I might say in this case it has been presented very thoroughly and ably and decently on the part of the [1306] defense as well as the prosecution. There hasn't been overriding or any tactics that might be regarded as subject to criticism.

Accordingly, ladies and gentlemen, I will recess the case until tomorrow at ten o'clock, with the same admonition to you not to discuss the case under any conditions or to form an opinion until the matter has been submitted to you.

(The following proceedings outside the presence of the jury):

The Court: On this last motion, I wish counsel would examine the record, and if I have failed to pass on any motion before me, I would like to have

it presented formally to me. On this last item reflected in Exhibit 4 that your account mentioned.

(Further discussion.)

The Court: We might begin at twenty minutes to ten, or a quarter to ten in the morning, and take these matters up.

Mr. Hagerty: We will have a few other motions, for the general purposes of the record, your Honor.

The Court: Are there any other matters now?

Mr. Drewes: No, your Honor.

Mr. Lewis: No, your Honor.

(Thereupon the adjournment was taken until ten o'clock a.m. Wednesday, October 8, [1307] 1952.)

October 8, 1952, at 10:00 A.M.

ARGUMENTS IN CLOSING

(The following proceedings were had outside the presence of the Jury):

Mr. Hagerty: Your Honor, we would like to make certain motions at this time and certain other requests in connection with instructions. At this time, if your Honor please, it is the considered opinion of my colleague and myself that a motion for a mistrial should be made on the grounds that the evidence in reference to the Laura Foote pension case is so highly prejudicial in a case such as this and itself being practically an inference on an

inference since it is hearsay pretty much as to this defendant, that to admit it would certainly deny this man the judgment of the unbiased minds of twelve jurors. Since the charge here fundamentally is one of tax evasion, and we find here what purports to be an attempt to screen an applicant or to shield them, or to subversively gain for them a pension which the general inference is the person was not entitled to, we do not see how this jury, if they would consider that evidence, could possibly be fair in their judgment of this defendant in this case. On that basis we make the motion for mistrial at this time.

In addition to that we make a motion for a mistrial [1308] because of the admission of the evidence relating to the testimony of Mr. Ringo and his communications had from the defendant on the basis that they are in violation of a privileged communication because of the relationship of attorney and client existing there.

It is admitted if Mr. Ringo were only an attorney and the defendant had come to consult with him in reference to his tax problems, that there would be no question—even in the Himmelfarb case, as stated in the opinion in the Himmelfarb case, that there would then exist the relationship of attorney and client, and the attorney would have no right to disclose the communications made to him. But here in addition to being an attorney he is also an accountant. He has had further training than that usually accorded an attorney, and he is in a better position to advise, and because of that situation, because of

the very things he did, because of the testimony he gave on the stand, he said the man consulted with me in reference to his tax problems, and because of the whole general circumstances, we feel that that evidence, communications between the defendant and Mr. Ringo, were privileged communications and should not have been admitted into evidence here, and, as a matter of fact, without that evidence the Government's case would fall flat. They would have nothing at all to go about. They couldn't start the initial net worth for the beginning of the period which they [1309] have based their whole case upon.

So on those two grounds we ask at this time for a mistrial.

Your Honor may want to consider that and I will go on from there. I will say, failing that, we make a motion to strike out that testimony and instruct the jury appropriately.

The Court: I will reserve my ruling until I hear from the Government on that, without interrupting you on it further.

Mr. Hagerty: I see. Then, of course, we have the additional motion that we ask that certain testimony in reference to the Goodman photostats that was given by Mr. Root—

The Court: Specifically what do you have in mind on that?

Mr. Hagerty: To strengthen the record on page 1257, beginning at line 7, wherein Mr. Shelton asked—

The Court: Will you read it? I haven't a copy

of the record. Will you read to me just precisely what it is?

Mr. Hagerty: I will read it. This one is not so particularly important but anyway I will read it:

“Q. (By Mr. Shelton): Mr. Root, I will ask you whether or not you ever showed the defendant, Milton Olender, these two photostats which have just been introduced in evidence?

“A. No, sir, I don’t believe so. I believe [1310] that Mr. Ringo inspected them.”

Of course, that is objectionable because it is an opinion in a situation of that sort.

“The Court: Where is the third invoice? There was another invoice, wasn’t there?”

The Court: The motion is denied in that respect.

Mr. Hagerty: Then Mr. Shelton says:

“Mr. Shelton: Your Honor, I do not recall that there was a third one related to those two. I may be in error.”

Then going on down to line 17:

“Q. (By Mr. Shelton): Will you state the dates of those two invoices, Mr. Root, and the amounts of the purchases as shown on the invoices?

“A. June 8th, 1944, \$9,600.

“Q. And the other one?

“A. The other one, June 14th, 1944, \$690.

“Q. Would you also read the price of the suits on first the June 8th invoice and then the June 14th invoice, Mr. Root?

“A. On the June 8th invoice there are 400 18-ounce suits at \$23 each.

“Q. On the 14th invoice?

“A. June 14th invoice there are 30 18-ounce suits at \$23 each.” [1311]

I believe that is all that occurred in front of the Jury. But I would ask that testimony of Mr. Root's to be stricken from the record in reference to those photostats. It is all hearsay.

The Court: You are particularly concerned about the price, aren't you?

Mr. Hagerty: Yes. The price and the amounts and the dates of delivery, you see. It gives——

The Court: The price more than the dates.

Mr. Shelton: Would your Honor hear from us on that?

Mr. Hagerty: I haven't finished my motions. Should I complete them?

The Court: I'd rather you complete them.

Mr. Hagerty: Then we would make for the purpose of the record, and also partially based upon the preliminary motions, a motion for judgment of acquittal for this defendant at this time. Failing that in the entirety, we would make at this time a motion for a judgment of acquittal on the count covering 1946 as there is no testimony or showing of unreported income in that year, with the exception of the transaction involving the sale of the Riverdale Ranch of which the defendant's share was \$497.64.

Mr. Shelton: That is tax, Mr. Hagerty.

Mr. Hagerty: Is your figure in agreement with ours?

Mr. Shelton: The \$2,016 figure is arrived at from the [1312] stipulation. That is the understated in-

come, of \$2,016, which ties in to the loss in the same year on the Wilson property, and the figure of \$497 and some cents is tax, was the third and final computation made by Mr. Hellman.

Mr. Lewis: Your Honor, that \$2,016, I think Mr. Shelton will agree, that there is only \$1,008 of it that is taxable.

Mr. Shelton: It is half non-taxable. I concede that.

Mr. Hagerty: So the tax amounts to, as I understand it, \$497.64, is that right?

Mr. Shelton: Yes.

Mr. Hagerty: Which is not a substantial amount. The income withheld is not a substantial amount to justify the use of the net worth theory in a case of this sort. So as to the year 1946 I would ask for a judgment of acquittal on behalf of this defendant on the grounds that there is no showing of a substantial evasion or understatement of income in the record and there is no showing that he was engaged in any other businesses or had any other sources of income other than the five enumerated even by Mr. Mytinger on the stand when he was recalled, I believe, yesterday.

Then after those motions, your Honor, I have two other requests in reference to instructions. I have talked with Mr. Drewes and he has agreed or stipulated with me that in his supplemental instruction 1, the last paragraph reads:

“It was therefore unlawful for the [1313] defendant to omit the Goodman suits from the inventory reported on his return if he did so knowingly.”

We have asked, and Mr. Drewes has agreed, that instead of the word "knowingly" being used, that the three words, "with criminal intent," be substituted therefor.

And then on our own behalf we would ask if your Honor would give as an instruction sub-section 6 and 7 of the California Code of Civil Procedure in Section 2061.

The Court: How does that read?

Mr. Hagerty: Which reads to this effect, sub-section 6 says:

"That evidence is to be estimated not only by its own intrinsic weight, but also according to the evidence which it is in the power of one side to produce and the other to contradict, and, therefore,"

According to sub-section 7:

"If weaker and less satisfactory evidence is offered when it appears that stronger and more satisfactory evidence was within the power of the party, the evidence offered should be viewed with distrust."

The Court: You might present that in the form of an instruction.

Mr. Hagerty: Thank you, your Honor. And that is all my motions at this time. [1314]

The Court: You intend to argue from that certain aspects of the Goodman matter?

Mr. Hagerty: Yes, your Honor, and of the entire case.

The Court: I will consider it if presented in a written form.

Mr. Drewes: Will your Honor hear from the Government?

The Court: Yes.

Mr. Drewes: Now, taking the last matter up first in order, we will oppose the giving of that instruction on this ground, the absence of records in this case goes to the very heart of the case, it is that core of it. The instruction which Mr. Hagerty urges upon you, as I conceive, is properly given where there is some rational explanation or some grounds for believing that better evidence could not have been produced. That, of course, according to the Government's theory in this particular case, is simply not so. It is our thought that the records are not produced because they were intentionally either never made or destroyed. I think the giving of instructions that Mr. Hagerty urges upon you would under the peculiar circumstances of this case create a misapprehension, misunderstanding in the minds of the jurors.

Mr. Hagerty: My purpose in requesting the instruction, your Honor, is not in any way to cover our side but to attack the other.

Mr. Drewes: Well, it would work both [1315] ways.

Mr. Hagerty: Yes. You could use it against me, that is true. It is a two-way sword. But I feel that in this case a man whose name has run from the very start of the case should have been produced, Mr. Goodman, and I think I am entitled to argue that to the jury——

Mr. Drewes: We made our showing in that——

Mr. Hagerty: I think it is a very good showing.

Mr. Shelton: It is purely the conclusion of counsel.

Mr. Hagerty: That section of the California law would certainly cover that in argument. That is my feeling.

Mr. Drewes: I certainly do not think the Government should be held chargeable for failing to produce a witness who is apparently seriously ill, but in no circumstances——

Mr. Hagerty: Or a substitute for him?

Mr. Drewes: There isn't any substitute. Of course, that isn't in the record. If your Honor cares to hear further explanation——

Mr. Hagerty: This letter is not even in affidavit form.

Mr. Drewes: We had no control over that, as I explained that to the Court at that time.

Mr. Hagerty: The Government has offices all over the country. They could have procured depositions, they could have done lots of other things.

Mr. Drewes: The fact of the matter is Goodman has been ill. His records are—— [1316]

Mr. Hagerty: That is the reason I offered the instruction. I feel I should be able to argue the position.

Mr. Drewes: His records are in New York in the hands of an attorney, and the Government is at a loss to know who else there is to put the records in. Would your Honor care to hear the teletype that Mr. Shelton referred to?

The Court: Was Mr. Goodman ever under indictment?

Mr. Drewes: He was under investigation for a very long period of time.

Mr. Shelton: Not to my knowledge.

The Court: Well, the records in the hands of the attorney would have no particular sanctity there. They might be divulged or disclosed under process of court.

Mr. Drewes: My problem was how to identify them. They are there and are available but in the absence of Mr. Goodman I don't see how we could lay the foundation for introducing them, your Honor.

The Court: Isn't the Goodman firm still in existence?

Mr. Shelton: No, your Honor. He was operating under an individual basis, and at the end of the black market period he apparently got out. I would like to invite your Honor's attention——

The Court: When did the black market period end?

Mr. Shelton: In 1945, I think, your Honor. I would like to make a point here, that the defense has contended that [1317] some of these Goodman invoices might be fictitious. It wouldn't do any good to bring in a piece of paper to show it to be an invoice on the Goodman billhead, if in fact it was a fictitious invoice, and the Government would have a very sharp challenge from the defense to prove the genuineness of the invoice. The piece of paper wouldn't have been enough.

Mr. Hagerty: If your Honor please, without disclosing the full theory of my argument, that was just one attack we made upon the Government presentation. There are other gaps that had I been in charge of the prosecution I think—well, I don't mean to say—it is from the way we see it, they could have made a much stronger case if they had the evidence and they didn't have the evidence so they have used secondary evidence—if they had a case originally. And that's the only purpose of the request.

The Court: Let us pass that phase of the Goodman matter and the instruction proposed and take up the other items.

Mr. Drewes: With respect, your Honor, to privilege on the part of Ringo, that has been argued quite extensively.

The Court: That motion is denied.

Mr. Drewes: And the next point, your Honor, on the Foote transaction, I seriously question whether or not that evidence has the effect that Mr. Hagerty seems to attach to it. In any event, as I explained to the Court before, it [1318] was introduced out of the presence of the jury, was produced for two purposes, one, to rebut the testimony of Mr. Olender that \$5,000 gifts were made to him over a period of ten years and made to him and his wife jointly. The affidavit of Mrs. Foote which was executed—that is, the affidavit of Mrs. Olender, which was executed in 1939, flatly contradicts that testimony.

Secondly, the purpose of introducing the testi-

mony was to establish that the defendant never in fact received from Mrs. Foote \$2,500 which, according to his testimony, she had accumulated over a number of years. Now all of the records in the Fresno Department of County Welfare indicate they had no money, that \$152 is a joint account with Mrs. Olender was all she ever had.

Those were the purposes for which that evidence was introduced. I believe it is admitted for that purpose.

And we rest there.

The Court: I believe it is admissible for the purpose indicated.

Mr. Drewes: Mr. Shelton, will you discuss the matter of——

The Court: Accordingly, the motion in that respect is denied.

Now the other motion is a motion for judgment of acquittal. I will deny that. [1319]

Mr. Shelton: Including the individual request as to the year 1946?

The Court: Yes, that will be denied.

Mr. Shelton: Now, your Honor——

The Court: On this matter of the invoices?

Mr. Shelton: Yes. If your Honor please, on this matter of the Root testimony the Government relies here on the testimony at page 1244 where Mr. Lewis read from the——

The Court: What does that say?

Mr. Shelton: I am just going to read it, where Mr. Lewis read from the exhibit in evidence and himself put this in the record:

“I am offering the portion of the exhibit at the bottom of the page reading as follows:

“Goods received as follows:

“5/25/44, \$1,610.

“6/4/44, \$9,200.”

I may say parenthetically that should be “6/8,”—the “4” was a typographical error.

“6/14/44, \$690.

“Balance, \$9,050.

“Total, \$20,550.”

Now at that point Mr. Lewis himself brought the transaction into the record as to just what Mr. Root included in that material that he gave to Mr. Ringo, and Mr. Lewis having [1320] brought that in on behalf of the defense the Government is then entitled to show by oral testimony the source and in connection with that source the testimony by Mr. Root paraphrased what Mr. Lewis has said and then went further and gave the prices.

Now, if your Honor please, we feel that the only substantial question is about the prices, that Mr.—

The Court: I feel that that is a question, because the prices were gleaned from the invoices themselves.

Mr. Shelton: That’s right, but since the prices do tie into the totals, the Government strongly feels that Mr. Lewis having opened that matter up as to the invoices the Government was entitled to show from those invoices the prices appearing thereon, that it was a proper development of an issue raised by the defense.

Mr. Hagerty: But, if your Honor please, in a larger sense, this document was put into evidence with the power and permission for the jury to examine during their deliberations. Now in looking at the transaction, and realistically, we can't but escape the conclusion that the jury would read every bit of that document if they looked at it. The old rule of law is that if you admit a part of a letter the whole thing goes in, and I made that objection at the time that this document was admitted into evidence. It is our theory that the Government put into evidence originally the entire document. [1321] They said, "Oh, no, we want only that line in."

Mr. Lewis' transaction was merely to show that that information didn't come from Mr. Ringo, that it came from Mr. Root.

Mr. Shelton: But he showed the substance of the amounts, your Honor. He showed the dates, he showed the total purchase amounts on each date as shown on the invoice, and having shown the totals shown by the invoices it is then meet and proper that the Government should be allowed to show the items making up those totals.

Now so far as the invoices themselves are concerned, they have now been stricken from the evidence and the Government agrees that ruling was proper so far as allowing the witness to testify the basis on which he furnished the information, we believe that was quite correct.

The Court: The same result would be derived at as a result of arithmetical computation, if you

divided the number of suits into the totals. Is that correct?

Mr. Shelton: That's right.

The Court: As to price.

Mr. Shelton: I believe that is right. With the one possible error.

The Court: There was an error in the \$9,000 item, I think, which was corrected.

Mr. Shelton: Yes, your Honor. [1322]

The Court: I think as the evidence unfolded, and in view of Mr. Lewis' examination on that point, that the motion to strike that testimony should be denied. Accordingly I will deny it.

The matter therefore rests upon the instruction. I will pass upon your instruction—I shall read it hereafter, your proposed instruction. My present inclination is to give that instruction based upon the Code Section.

Mr. Hagerty: Thank you, your Honor. We will have it prepared, typed out then, those two sections.

The Court: I am not committed to that, but that is my present inclination.

Mr. Hagerty: I think that is fundamental logic.

Mr. Lewis: Your Honor, we have one more matter, and that concerns the Magnin, Gray Shop expenditures which——

The Court: I haven't ruled on that matter of the Magnin, Gray Shop—is that what you are coming to?

Mr. Hagerty: Yes.

Mr. Lewis: Yes.

The Court: Go ahead.

Mr. Lewis: As you remember, that was the \$2,000 some odd item, whether or not the money had come from the safe deposit box or whether it was a checking item, no one testified to it. They couldn't determine, that there is any evidence to justify removal of that from Schedule 4. The same [1323] evidence would necessarily require that these items be eliminated from the nondeductible expenditures. In other words, the Government is attempting to have its cake and eat it, too. They are claimed to be check expenditures so as not to belong in Schedule 4; then they are not admissible as additional nondeductible expenditures on Schedule 3 (a) or U. S. Exhibit 51. If, however, they are cash expenditures, the cash must come from the safe deposit box, since, according to Mr. Olender's testimony, any cash expenditure, if not traceable to a withdrawal from the bank account, emanated from the safe deposit box, which was his sole cash depository.

Mr. Shelton: If your Honor please, the testimony of Mr. Olender was clear-cut, that he did not know where the money came from to pay the Gray and I. Magnin accounts. The defense, including those items on Schedule 4, is based on the contention that there is evidence that they came out of the box. Now the box was admittedly under the control of the defendant and if he didn't know how the payments were made to the Gray Shop and I. Magnin, then the defense cannot say that that testimony supports the contention that it came from the box.

The Court: Well, Schedule 4 in major particulars is a document based upon reconstruction, recollection and correlation of events. Some of the items found on Schedule 4 are admittedly based upon inferences to be drawn from certain [1324] admitted facts, and I think it is a matter of argument on Exhibit 4 as to its worth. I believe that there was sufficient evidence to support the introduction, although perhaps slim in part, and we come back to my original premise and my original thinking in this case, the beginning and the ending of this case is the credibility of the defendant, and Schedule 4 is another criterion of credibility, and I think you can apply the test thereto in the light of the general picture as it is unfolded in this case. I believe in the light of my general reasoning that therefore these two items should remain as indicated.

Mr. Drewes: May I state one thing in that connection?

The Court: Yes. Otherwise I am going to emasculate my own ruling then and make myself perhaps illogical as to one phase of the document because although the defendant did not recollect the precise source of the funds, he did state that the funds came from certain quarters, and by process of elimination we eliminate, ergo, it came from the box. Now that may be fallacious from your viewpoint. But that is a matter of argument.

Mr. Drewes: If I may just say this, that the Magnin and Gray Shop matters differ from the others in just this particularity. Of course, we have

all had an opportunity to review the record in the last couple of days, and in connection with the Magnin and Gray Shop transactions the [1325] defendant testified categorically that he didn't even know that the accounts existed. Now if he didn't know they existed, how did he take the money out of the box and go and pay them? That is the only difference between those two items——

The Court: Argue that to the jury.

Mr. Drewes: All right. If you don't take care of it, I will certainly do my best.

The Court: I pass upon the law. Call in the jury. It is a very pretty argument before a jury.

(The following proceedings were had within the presence of the jury:)

The Court: Is it stipulated all the jurors are present?

Mr. Hagerty: So stipulated.

Mr. Drewes: So stipulated.

Mr. Lewis: Yes.

The Court: Ladies and gentlemen, I might say as a preface to the arguments that these recesses that we have had from time to time during the trial are taken in aid and in order to facilitate the furtherance of the trial and the administration of justice. There are two particular and distinct phases to the trial of a case and, as I attempted to disclose to you at the very outset, I occupy a role that is peculiarly and singularly my own, and that is my function to administer the law of this case. Now in administering the legal aspects of a case

there arises certain channels of [1326] activity. During the course of the trial, as you observed, the Court was required to pass upon the admissibility of evidence, and there has grown up in the law traditionally certain rules, certain safeguards. In that connection I attempted to rule in the light of the law, as I know it and as I read it, and in the light of our trial experience, and in view of the traditions of these Courts and the common law practice, and our Rules of Federal Procedure, all of which have taken generations to build. You are not to surmise nor conjecture as to the reasons underlying my rulings. You may disagree with me. You may say if I had occasion, I would rule differently. You indicated to me when you were accepted as jurors you would agree with my rulings, and accordingly that is your bounden duty. If I have stricken from the record certain testimony, you are bound by that no matter what your personal view may be, and in like manner I am bound by your province—that is, passing upon the facts.

You come now to the phase of the case wherein the impact of it is going to be felt more keenly by you, and very shortly, within the next day or so, we will have to part company. You will go your way into the jury room and I will have to finish my duties insofar as finally instructing you as to the law.

In that connection I will do it as carefully and as [1327] painstakingly as I may be able. I give you these preliminary thoughts in order to make you a little more receptive to the argument.

The arguments are not given to you in any oratorical sense, nor are they given to you to waste your time. As I indicated to you, counsel on either side have the bounden duty to represent to you from their viewpoint and as strongly as they please from their viewpoint their theory of this case.

The defendant, as I told you at the threshold, entered a plea of not guilty. He therefore put in issue all of the material allegations of the complaint, and there are three counts in the complaint, and he said to the Government: You must prove those charges to a moral certainty and beyond reasonable doubt.

The Government says it has. The Government has completed its evidence.

Now you will hear from counsel for the Government in his opening statement. He of course has the right to close. The defendant counsel will present their theory to you.

You may now proceed, counsel.

Mr. Drewes: First, your Honor, there was heretofore offered into evidence the affidavit of Milton Olender to the Bureau of Internal Revenue in connection with his father's estate. There was some difficulty to locate it. For the [1328] purpose of the record, may I renew the offer?

Mr. Hagerty: Of course, the defendant, your Honor, will make the objection on the record because the case in chief has been closed.

Mr. Drewes: That was offered and admitted in evidence but we could not find it.

The Court: You since found this affidavit?

Mr. Drewes: The Clerk had it. He put it in a separate envelope.

The Court: You found it, Mr. Clerk? Will you indicate for the record what happened, please?

The Clerk: Yesterday counsel for the Government offered several items that had been marked for identification and included this which had no mark on it whatsoever. It had simply been lodged. And after searching through the items that we had here I found it and it is being reoffered this morning.

The Court: Well, in fact this was admitted in evidence during the trial.

The Clerk: No, your Honor, it was simply lodged with the Clerk and has never been marked for identification or any other mark except that it was lodged with the Clerk.

Mr. Hagerty: We had discussed it before, your Honor, and I had objected to it then, although we have all seen it and certain portions of it have been read to the jury. [1329]

The Court: Well, this has been referred to during the trial?

Mr. Drewes: Oh, yes.

Mr. Hagerty: Yes. Just for the purpose of the record, to be consistent with our former position, we are making our objection at this time.

The Court: You were instructed to have the jurat affixed.

Mr. Drewes: Yes. That is why it was lodged with the Clerk.

The Court: It may be marked. Did you ever get the jurat?

Mr. Drewes: No, we did not, your Honor.

The Court: It may be marked. To that extent the evidence is reopened for the purpose of marking that in evidence.

The Clerk: U. S. Exhibit No. 67 in evidence.

(Thereupon affidavit of Milton Olender, to Bureau of Internal Revenue, was received in evidence and marked U. S. Exhibit No. 67 in evidence.)

Opening Argument on Behalf of the Government

Mr. Drewes: May it please the Court, ladies and gentlemen of the jury, I think I will dispense with this (referring to microphone), and if you have any difficulty in hearing me, will you please so indicate. I will try to do better. If I then don't succeed, then I will resort to the [1330] microphone.

As his Honor has indicated to you, it is now the time for the Government to present to you its views of this case.

It has been a long case. It has been certainly an involved case. I'm afraid that it has not been a very interesting case. That may be all to the good. Criminal cases should be considered by jurors dispassionately by the application of logic and reasoning. I think that is particularly true of this case, to the extent that it has not been an exciting case, possibly to that extent it will be decided more dispassionately and on a more rational basis than possibly some of our cases are decided.

The Government is convinced that after you have considered carefully all of the aspects of this case you will conclude that approximately 90 per cent of the defense is sheer fabrication, it will not stand up under logical analysis, it will not stand up under reasoning.

Now as you know the defendant has been charged in four counts with wilfully attempting to evade his income tax and that of his wife for the years 1945 and 1946. In order to prove its case, as the Court will instruct you, the Government must establish first that there was a substantial unreported income upon which tax was due, and, secondly, that the defendant wilfully intended to evade his taxes and to defeat the revenues of the United States. [1331]

In this particular case the two are peculiarly interwoven, although in theory the Government must establish both elements to ask for a conviction. In this particular case the record is such, I believe, that it comes down to this, if you believe the defendant's explanation for these various complicated transactions, then, of course, he had no intent, and by his calculations there is no substantial understatement of income. I believe there is an overpayment contended for by him in 1946. But if you disbelieve his testimony, as I believe you will, not only is there a very material understatement of taxable income but it necessarily follows that he intended to defraud the United States of its taxes because the entire scheme, if disbelieved, carries with it the inescapable conclusion that he intended

to achieve that particular result, the avoidance of taxes.

Now, we are using the net worth method of measuring the income of the defendant, and both of the experts have explained to you just what is meant by net worth. I don't think, however, that it would do any harm to explain it to you just briefly again.

Ordinarily, of course, when anyone, an accountant, business man, or a revenue agent, wishes to find out what income an individual or a business man has and what deductions he may claim, you ordinarily just go to his books of account, turn to the proper pages and there you are. It is all [1332] set forth. It is a very simple matter. But when books of account are not kept at all or are incomplete and do not reflect the income of the individual, there is no other way to measure it, his income. There is just nothing to which you can go. There is no record. You don't know what his income was. You don't know what his disbursements were. And so it is hopeless. So, of course, the alternative way of doing it, the only way of doing it, is to determine as of one period what the individual's assets were, what he owned, find out then at a later period, for example, a corresponding date—Let's take, for example, the end of the year, as we have in this case, of the next year, find out what his assets are on that date and subtract the difference. Now, if there is a larger figure, if he owns a lot more property at the end of the period than he did at the beginning, he had to have income with which to acquire that property. That, of course, is self-

evident. But then, of course, from that point on it gets a little more complicated because there are a number of adjustments that have to be made. That is just the figure in the raw. If you start out with assets having an aggregate value of \$100,000 as of the last day of one year and then determine that as of the last day of the next year he has \$200,000, obviously he had income of \$100,000 during the period. But that is, as I say, a figure in the raw because you have to make deductions, and I am not going through all of the possible [1333] adjustments that would be necessary. That would serve no particular useful purpose. But just for the purposes of illustration and to sketch out for you in broad strokes the approach, you would deduct of course any gifts that he got because that would add to his income during the period but it is not taxable. That is not his income. So you take those out. And if he made any capital gains, you would adjust for that portion which is not taxable. As you know, we have been through that in the Riverdale property at great length. That is handled in another way. So if any of that \$100,000 that he enjoyed during the year is to be attributed to capital gains, you have to adjust as to that. But now you also have to add to that \$100,000 whatever it cost him to live, he and his family, grocery bills and light bills and heat bills and gas bills and laundry bills and all expenses of that kind, you can't deduct from your income tax calculations—unfortunately, but you can't.

Now to the extent that you can establish that the taxpayer had living costs which were nondeductible,

you have to add to that—add that to the \$100,000 because he certainly, if he bought groceries, if he lived at all that year he bought groceries, and if he bought groceries you have to add them to the \$100,000 because they are not deductible.

Now, of course, similarly with taxes, Federal taxes, you have to add to the \$100,000 any taxes that he paid. If [1334] he paid the taxes the year he had the money—and you can't deduct from your Federal income tax calculations the Federal taxes that you pay, and so you have to add that.

Now that is the system that we have used here. Now the reason we have used it I think is quite apparent to all of you. The notorious Goodman transaction as established in the record is nowhere on the books of account of the taxpayer. He received \$7,000 from Mr. Saraga. More about that later. But where did it go? It went into his personal account, not into his business account.

He received \$5,000 from Mr. Lerman—and more about that, too, later. But that went into his capital account. Not into sales.

And then of course, Schedule 4, all of these withdrawals from the vault, all frankly admitted by Mr. Hellman on the assumption—When I say “all”—let me qualify that, lest I depart from the record. I am referring to those very many transfers to personal account and transfers to Olender-Elkus account, transfers to McGrete—there are a very great many of them. And for the three years in question the total of those withdrawals exceed \$92,000, and Mr. Hellman frankly stated on the

witness stand that they were included on the assumption that they could not have come from any other place. But that doesn't tell us where they came from, and there were no records, so obviously in this particular [1335] case we have to resort to the net worth method of determining income as the only possible way of finding out what this man had by way of income in the two years. There just wasn't any other way.

His own accountant, Mr. Ringo, testified that he didn't make an audit, and the reason he didn't make an audit was because it was impossible to verify the transaction. Let me just call your attention to that testimony. It appears at page 68 of the record. Question propounded to Mr. Ringo:

“Q. * * * I take it you did not make an audit of his books and records?”

“A. No, I did not make an audit of the books and records.

“Q. Will you explain why you did not?”

“A. Well, in a great many of these transactions, they were purely cash transactions by use of currency, and so forth, and it would be impossible to really verify figures.”

So, as I say, the use of the net worth method of calculating the taxpayer's income was the only possible way of making or of measuring the income that he enjoyed for those two years.

Now let me point this out to you, too, and I believe it will clarify it for you, if there is any doubt in your minds, what a lot of the shouting has been about. Suppose that we have an ending net

worth of \$200,000 and a beginning net worth [1336] of \$100,000. Now the increase in net worth for the period would of course be \$100,000. This is the beginning and this is the ending, and I have put them in the reverse order for the purposes of making the simple mathematical subtraction (placing figures on blackboard). As I say, the raw net worth is \$100,000. Now it is to the advantage of the defendant to increase this beginning net worth as much as he can. If he can increase this beginning net worth to \$150,000, then what is the measurement of his income for the period? It is reduced to \$50,000. And it is also, secondly, to the interest of the taxpayer to decrease the ending figure. If he succeeds in decreasing the \$200,000 to \$100,000, he has likewise succeeded in reducing his measured income for the period. Again the taxpayer seeks to increase his beginning net worth as much as possible—that is to his best interests to do so, and it is also, and for exactly the same reason to his best interests, to make the ending net worth as low as possible, for the same reason. Now that of course is what the taxpayer has done here.

Now the defendant's Exhibit AK, or what is probably better known to you as their Schedules 3, 3-A and 4, the taxpayer, as you will see from Schedule 3, which I believe you have—Don't you have that?

(A juror: No.)

(Schedules passed to the jury.) [1337]

Mr. Drewes: You will note on their Schedule 3,

halfway down the page, or not quite—"Net worth per Government computation." Now those are taken from the Government's figures, which you also have. However, of course, in connection with the Government's figures you have the computation of taxable income due—taxable income unreported and the tax thereon, which isn't shown on defendant's Schedule 3, because they go on and make their own.

But to go back. Schedule 3 starts with the Government's computation of net worth. Now, as I pointed out to you, the defendant seeks to increase that beginning net worth. The more he can increase that, the less will be his income for that period, the period 1945—we start with 1944 and end with 1945. Now, the bigger the base period, the more he can increase the beginning net worth, holding the ending net worth constant, the lower will be his measured raw income. Now he seeks to do that first, you will note, by increasing cash in the safe deposit box. We credit him with \$50,000. He contends that he had over \$72,000, and so he would increase the net worth right there by \$22,000.

Next he calls attention to an outstanding check which should have been compensated for and asks that another thousand be added to the beginning net worth.

Then he comes to the famous Goodman transaction and he says: We had all Goodman suits and they weren't in inventory [1338] so we have to add those. When he says he had them, he had them as

of December 31, 1944, so we have to add that large figure of \$20,000.

And then he says: Our accounts payable were overstated. In other words, we had our books reflecting that we owed more money than we really did, because we had already paid those bills and neglected to credit ourselves with them in our books. So we are going to add that \$7,000 back and then correspondingly increase our beginning net worth.

Now in 1945, you will note, he picks up the Saraga check.

Let me go back first. There is another item here. He says that he has \$30,000 on hand as of December 31, 1945, and whereas we only credit him with \$7200, and he adds that to his beginning net worth—pardon me—to his net worth for the year 1945, and he adds the Saraga check to his 1945 net worth.

Now he deducts then from both, because it is to his best interests to cut down as far as possible his ending net worth as of 1945 and 1946—he takes from both \$20,000 because those, of course, you recall, he says are bonds which in fact belong to his mother and not to him.

Then finally, if you turn to Schedule 3-A in the year 1945 he would then have us deduct \$6,000. Why? Well, that is one of the calculations or computations which, if you [1339] believe, must be made for the reason that gifts are nontaxable income, and if he received that money as gifts it would reduce his net worth for the year 1945 by that much. Those gifts came from Mrs. Olender and also other funds

not by way of gifts, however, from Mrs. Widrin and Mrs. Foote. Now more about those later.

I want to take up each one of those calculations in turn.

The Court: Counsel, this might be a convenient time to take the morning recess.

Mr. Drewes: Yes.

The Court: Ladies and gentlemen, we will take the morning recess, and the same admonition during the course of argument as during the course of trial, not to discuss the case under any circumstances, not to form an opinion until the matter is submitted.

(Short recess.)

Mr. Drewes: Now it is my purpose to discuss with you each one of the adjustments which the defendant contends should be made in the Government's computations of net worth for 1944, 1945 and 1946—not necessarily in the order as they appear on the Schedule 3 which you have. For example, the \$1,000 item appears to have been an outstanding check which was not thought of by the accountants during the course of their examination, and therefore the cash figures which appear [1340] earlier in the schedule are understated. The Government contends that figure, \$1,000, should be added to the beginning net worth.

Now with respect to the \$7,000 overstatement of accounts payable—that, you understand, the defendant contends was an error on his books, that he had in fact, according to his views of the matter,

already paid those obligations but he had not so reflected on his books, that his books didn't show it as of the end of 1944, therefore, according to the defendant, he had overstated his liabilities and, consequently he had understated his net worth as of that period. Now that particular item, you remember, consists of purchases from two sources, from Barney in the approximate amount of \$2,000, and from Money Back Smith in the approximate amount of \$5,000. Now with respect to the purchases from Barney, we concede that. The defense produced in Court defendant's canceled checks which do establish that he had in fact paid those bills, although he had not recorded the payments in his books. In other words, he still carried them as of the end of the year as outstanding debts of his. Now, the other \$5,000 is the Money Back Smith transaction. We do not agree. You will recall, I am sure, that the books reflect—the taxpayer's books of the Army and Navy Store, reflect the entries of accounts payable to Money Back Smith as of the last day of the year, December 31, 1944, whereas he testified that those purchases [1341] were all made at the beginning of the year and the failure to pick up those purchases in the books for ten or eleven months is unexplained. You remember Mrs. Manger testified that she didn't know. She was the bookkeeper. She couldn't recall why those entries should have been made at the time, ten months or eleven months, as the case may be, after the purchases. And I asked Mr. Hellman if he could explain, and he didn't know. Further, you will recall, Mr. Lorenzen of

Money Back Smith testified that he had made sales to Mr. Olender and he had received in payment therefor sometimes cash, sometimes checks, and Mr. Olender himself, in testifying on that point, said that he had paid part in cash and part in checks. Where are the checks? They haven't been produced. So we are not willing to concede that the Money Back Smith transactions were in fact as contended for by the defense.

Whatever view of the matter you may take, ladies and gentlemen, let me call your attention to the year 1945. The Government contends that the understated—unreported net income is just a few dollars less than \$47,000. Now there is plenty of room there to absorb the \$1,000 error and the Barney transaction.

With respect to the \$7700 item appearing in Schedule 3 as an addition to net worth in 1945, that appears to be correct. We don't concede for a moment that the Saraga transaction had anything to do with the Goodman transaction, as the [1342] defense sought to have you believe. But whatever the explanation may be, it does seem apparent that as of the end of 1945 Mr. Saraga did have in his possession this money, for whatever purpose however it might have, he did have it and it belonged to Mr. Olender. Therefore, it is properly added to his net worth as of that year.

Of course, by increasing the net worth by that amount in 1945, that helps the Government.

Now I want to take up with you the subject of cash. The two most important adjustments which

the defense seeks to make in this case with respect to the beginning point are the adjustment to cash, increase it by \$22,000, and the Goodman suits—also over \$20,000.

I want to turn my attention to those particular points.

First, with respect to the cash. The United States contends that as of the beginning of—that is, at the end of 1944, which is the starting point, the base point, that the defendant had \$50,000. The defendant contends that he had \$72,000 plus, and therefore would increase his beginning net worth by \$22,000, which is to his advantage because that will cut down, if he succeeds, his increase in 1946. Now the Government agrees that the defendant had over \$70,000 in May of 1944 in the safe deposit box. The defendant's Exhibit D, you recall, is an affidavit executed by Monroe Friedman. Mr. Friedman, now Judge Friedman, states that at that time the [1343] defendant had money in the box. That is certainly good enough for us. However, the affidavit recites that, "On April 22, 1944, the affiant (Monroe Friedman) went to the box with Mr. Olander where the money was found, and that the had over \$70,000."

Now, that is April 22, 1944. That is over seven months before the starting point in this case, and although we concede that he had the \$70,000 in April of 1944, we do not concede that he had it on December 31, 1944. We do not concede that it was Mr. Olander's money. We don't know whose money it was, and we most certainly do not concede that

it came from his father's estate, as he would have you believe. To the contrary, the Government's position is that the entire record in the case negatives the contention that the money came from his father. The defendant testified that his sister, who is an attorney-at-law and was attorney for his father's estate, did not know anything about the \$5,000 of annual gifts. Highly unlikely. The estate tax return which was filed with the United States Government in connection with his father's estate specifically states that no gifts of any kind were made by the decedent prior to his death. The defendant, Mr. Olender, was the accountant for the estate. You recall his testimony. He would have you believe that the only work he did in connection with his father's estate had to do with various conferences concerning the evaluation of real property which [1344] is listed in the estate tax return, Government Exhibit No. 46, and that another accountant prepared it, a man by the name of Reed. The estate tax returns, showing under the section of disbursements, show that Mr. Reed got a hundred dollars for his services. Mr. Olender got \$1900 for his. Let me read this to you again:

“Schedule G, Section 3, did the decedent at any time make a transfer of an amount of \$5,000 or more without an adequate and full consideration in money or money's worth?”

That is legal language meaning: Did he make a gift—and the answer, “No.” No gifts. And the defendant has testified that to this date no amended return has ever been filed with the United States

Government correcting that document if it is in error.

The defendant testified finally that the gifts were made to himself and to his wife. Let me read to you:

“Q. (By Mr. Hagerty): Now you have testified that during the period of time from approximately 1930 to 1939 your father made gifts to you of approximately \$5,000 each year in cash and placed it in the vault in the Olender Building in Fresno?

“A. Yes.

“Q. Was that gift for you alone?

“A. No, it wasn't. It was for me and my [1345] wife.”

But Mrs. Olender, in connection with her mother's eligibility to receive old-age benefits in the State of California, executed a sworn statement on the 23rd day of May in 1939 in which she set forth a description of what she owned, of what her assets were. Let me read to you from this affidavit:

“Do you or your spouse own your own home?

“No.

“Have you any cash on hand?

“No.

“Have you deposits in the banks?

“No.

“Have you deposits with building and loan associations?

“No.

“Have you postal savings?

“No.

“Do you keep funds in a safe deposit box?”

“No.

“Do you own negotiable securities?”

“No.

“What are your spouse’s earnings?”

“\$150.

“Subscribed and sworn before a Notary Public.”

That was in 1939.

According to the defendant’s testimony, he and his wife [1346] had in the vault in Fresno by way of gift from the father either forty or fifty thousand dollars, depending upon whether the 1939 gift had been made or hadn’t been made at the time that affidavit was executed. Mrs. Olender in a sworn statement under oath in May of 1939 says she has practically nothing.

He had the money in the box but it didn’t come from his father’s estate. That must be clear. Where did it come from? Only Mr. Olender knows. But we think we know. We think that money was accumulated from unreported transactions in cash similar to the Goodman transactions in prior years. That’s where we think it came from.

Now the Government has given him credit in its beginning net worth of \$50,000. We base that on information which the taxpayer himself gave to his own accountant, Ringo.

Now, ladies and gentlemen, I want to give you the Government’s Exhibit 26. This is a photostatic copy, you will recall, of comparative net worth which was made by Mr. Ringo in his own handwrit-

ing and is based upon information given him by the taxpayer. That is Exhibit No. 26.

Exhibit No. 45 is likewise a photostatic copy of a series of questions and answers propounded to Mr. Olender by Mr. Ringo in the course of his attempt to reconstruct Mr. Olender's net worth, as the accountant for Mr. Olender.

And under No. 19 you will see on the right hand side here [1347] a number of figures and these figures are in the handwriting of Mr. Ringo. But the information likewise came from the taxpayer.

I am going to ask you to take the time to look at each one of these documents.

Exhibit 26, cash in vault, is the particular item I wish to have you—I will ask you to examine (handing to jury).

The Court: Does that document bear a date, counsel?

Mr. Drewes: I don't recall. Which document, your Honor? Number 26 is the comparative net worth.

The Court: The memorandum.

Mr. Drewes: Number 26 is simply entitled, "M. Olender comparative balance sheet 1941-1946."

There appears to be no date on it.

The Court: And the other one?

Mr. Drewes: No. 45 appears to have no date at all.

The Court: What, if any, date is reflected in the record concerning those exhibits as to the date or approximate date of their preparation and submission?

Mr. Drewes: It is my recollection, your Honor, that——

The Court: I can't recall presently. That is the reason I asked.

Mr. Drewes: It is my recollection that Mr. Ringo prepared those in 1948 after his employment by Mr. Olender. That [1348] is my best recollection.

The Court: In reconstructing the situation?

Mr. Shelton: As I recall, Mr. Ringo testified that he did that during the course of his work. Whether in the year 1948, I am not sure, your Honor.

Mr. Drewes: You have all had the opportunity to examine these two documents.

If your Honor please, I see it is almost the noon recess. We had an interruption. There is little point in starting.

The Court: We will resume at two o'clock, ladies and gentlemen, the same admonition, not to discuss the case or to form an opinion.

(Thereupon an adjournment was taken until two o'clock p.m. this date.) [1349]

Wednesday, October 8, 1952, 2:00 P.M.

Mr. Drewes: Now, ladies and gentlemen, you have had an opportunity to examine Government Exhibit No. 26, the comparative balance sheets prepared by Mr. Ringo for the taxpayer, and you have had a chance to examine also Exhibit No. 45.

It is upon that evidence that the Government asserts that the defendant had \$50,000 in cash in his vault on December 31, 1944. You recall that Mr. Ringo testified that that information came from

the taxpayer. You will recall earlier in my argument to you I pointed out that it is to his advantage, the advantage of the taxpayer, to make his beginning net worth as large as possible. Therefore I submit to you that there is every reason to believe the figures which appear in those documents, which you have just seen, represent the best possible showing that the taxpayer felt he could make. Mr. Ringo, you will recall, is a certified public accountant, and you can be very sure that he appreciated the fact that the larger the figure, the more advantage it was to his client.

I also want to call your attention to the fact, as you have seen, there are a number of items included in this Exhibit 45—with the exception of minor adjustments for accrued interest and matters of that kind, every one of those [1350] items is included in the stipulation, which is the United States Exhibit No. 15. Of all the information pertaining to the defendant's assets, which were included by Mr. Ringo in the comparative net worth which you examined, that item and that item alone is the only one that is subject to attack at this trial. If all of those other items are correct and have been adopted for the purposes of this trial, is it not reasonable to assume that the cash involved—the cash in the safe deposit vault, is not also correct—again when it was to the best interests of the taxpayer to make just as big a figure as he possibly could? Now the taxpayer urges you to find that as of December 31, 1944, he had cash in the amount of a little over \$72,000, or \$22,000 more than we have given him

credit for. That is the first serious attack on the net worth statement as computed by the Government.

And upon what does he base that attack, ladies and gentlemen? He bases that on Schedule 4, which you have before you. The taxpayer testified that any assets which he enjoyed during the years in question otherwise unexplained must have come out of the vault. Mr. Hellman, who testified for him, stated with perfect candor that the withdrawals and some of the additions which were included in Schedule 4 were included on the assumption that if they couldn't be shown to have come from any other source or have originated in any other source, they either originated or came from the [1351] box. He also pointed out and agreed with me, when I asked him if there were not other possible sources from which unexplained receipts might not have come, and he admitted that there were: Interest on stocks and bonds might account for some of the receipts of the taxpayer, sales of other assets, about which we know nothing, might explain where the money came from. Re-deposits of cash which he had withdrawn from banks on earlier dates and then re-deposited at the time shown on Schedule 4 might well be the source of otherwise unidentified cash; unreported withdrawals from his business might be another such source. And in this connection let me remind you that the United States Exhibit, which is the stipulation, shows as the very first item, "Army & Navy Store, cash in store registers, 1944, \$2500," and in the following years 1945 and 1946,

\$1,000. So \$1500 was drawn out of the store and to this very moment nobody knows what happened to it. I asked Mr. Hellman if he was able to find out or ascertain from any other records of the taxpayer what happened to that \$1500, and you will remember he stated that he had not found it. We still don't know what happened to that money. And then, of course, transactions similar to the Goodman transaction, merchandise purchased in cash, sold, and the proceeds re-deposited, might also account for otherwise unexplained receipts.

As I stated to you a little earlier, under withdrawals on [1352] Schedule 4, transfers to personal bank account, transfers to Olender-Elkus account, transfers to the McGrete account, they aggregate over \$92,000, and there is no record by which it can be determined where that money came from. They are included on Schedule 4 predicated upon the testimony of Mr. Olender, and upon his testimony alone, that because he had only four or five designated sources of income, if he received \$92,000 in those three years it must have come from the vault. Now that is a big assumption and there at least five other assumptions which are equally applicable.

Consider Schedule 4. After that was first prepared it was necessary to revise it, and at that time there were added to the Schedule 4 the two items shown as January, 1945 and '46, "Receipt from partnership." There were added also two transfers to the Olender-Elkus bank accounts shown as withdrawals. The witness Hellman testified the May 31, 1945, four items, cashier's checks, purchased with

cash from the vault. The closing minutes of testimony yesterday established that those checks—pardon me,—that those cashier checks were purchased with defendant's Exhibit AQ, which is a check drawn on the Army & Navy Store. To be sure there was another deposit of cash unexplained on the same date in his personal account. But to the extent that Schedule 4 shows the purchase of four cashier's checks with cash out of the vault, it is wrong, because they were purchased [1353] with a check drawn on the Army & Navy Store.

You examined Schedule 26 just before the noon recess. I doubt if you saw this item, however, because I didn't call it to your attention. "U. S. Government bonds 1944." There is a figure shown of \$24,000, and down below it says, "Check 1991 \$5,000, vault \$9,000." "Vault, 9000." Look at Schedule 4. 1944, "Withdrawal purchase U. S. Treasury bonds, \$8,000." And the balance as of December 31, 1946, is \$385.02. If you increase the withdrawal from \$8,000 to \$9,000, you get a negative balance as of December 31, 1946. What sense does that make? How do you have negative cash? It makes no sense at all.

The two items, I. Magnin & Company and Gray Shop, which appear as the last two items on Schedule 4, they are, of course, included as withdrawals from the vault. Let me read to you the testimony of Mr. Olender in connection with the Magnin account. Mr. Hagerty asked Mr. Olender about the Magnin account and he asked some questions about

his daughter and then he said, speaking of the daughter:

“Well, did she make any other purchases that are represented in that account?”

“A. No.

“Q. The Magnin account?”

“A. I don’t know. But I believe she must [1354] have.

“Q. At any rate, did you pay for anything that she was charged with?”

“A. I didn’t even know those charge accounts existed.”

Now, ladies and gentlemen, if he didn’t know the accounts existed, how did he take the money out of his cash deposit—out of his safe deposit box and pay the bills? Schedule 4 purports to state that Mr. Olender withdrew the sums there shown from the safe deposit box and paid the Magnin bills. And in accordance with testimony you just heard he didn’t even know they existed.

Now don’t misunderstand me. I am not quibbling here. I am not just trying to pick this Schedule 4 to pieces to show that is inaccurate in this respect or another respect. I think the whole thing has no merit at all. It is an attempt on the part of the defendant by a process of reconstructing the information shown on his bank accounts in order to arrive at a favorable figure of cash as of December 31, 1944. He is faced with the problem of explaining all of these \$92,000 worth of transactions, for which there is no source indicated in any records anywhere. So by adopting the expedient of

assuming that they all come out of the safe deposit box, he works backwards and at one and the same time accomplishes two purposes. He explains these receipts and establishes a \$72,000 beginning base point. If you believe [1355] him, I don't see how you can believe him, the fact remains that these large sums of money are unexplained, and by adding them back, as appears in Schedule 4, the resultant \$72,000 has no meaning. It has no more validity than the means used to reconstruct it. I submit that Schedule 4 supported as it is almost in the entirety by nothing other than the testimony of the defendant has no validity. Putting it in Schedule 4 doesn't explain otherwise unexplained receipt of \$6,000. It just doesn't do it. The \$6,000 is still somewhere in the air.

What about Mrs. Foote's money? Mr. Olender testified at page 891 of the transcript as follows:

“Q. Is it now your testimony that \$3,000 of that money was or was not money of your mother-in-law's, Mrs. Foote? A. It was.

“Q. It was money of your mother-in-law's Mrs. Foote? A. That's right.

“Q. And under what circumstances did your mother-in-law give you that \$3,000?

“A. Part of it came from Mrs. Widrin, as she testified, and I had the balance and I had the money in my safe deposit box.”

Where is that on Schedule 4? No place. It is another [1356] error in Schedule 4. But it is further proof that Schedule 4 can't carry the weight that the taxpayer seeks to impose upon it. It is

nothing but a recapitulation of a cash position which has no more validity than the component parts. Inasmuch as we have no record to establish where those receipts came from, there is no reason to believe that they came from the vault.

Yesterday afternoon there was put into the record documents from the Bank of America. Those documents you recall reflected that on July 11, 1945, the taxpayer borrowed \$30,000 on a 90 day loan. On that date, as Mr. Mytinger calculated for you, he had over \$61,000 in the bank per Schedule 4, as he would have you believe it. On August 22, 1946, he borrowed \$10,000 on a 90 day note, and Mr. Mytinger calculated for you figures which are still on the board. He had \$17,900, or \$18,000, roughly, depending upon whether you include or exclude the I. Magnin account.

Now, ladies and gentlemen of the Jury, if the taxpayer had \$61,000 cash in a safe deposit box in July of 1945, why did he borrow \$30,000 on a 90 day note, which, as you gentlemen who are business men know, is the typical short-term negotiation used to finance business transactions. Why did he borrow \$10,000 on August of 1946 if he had between \$18,000 and \$19,000 in cash, according to Schedule 4, in the vault? What's the answer? The answer is he didn't have the [1357] money in the vault, and I wonder whether the Government wasn't a little bit generous in giving him \$50,000 credit in 1944. It could well be.

Now I want to turn to the Goodman transaction. The Goodman transaction, according to the defend-

ant's testimony and those of the witnesses which were called, you will remember, is set forth in Schedule 1, the so-called flow chart, and that is the defendant's Exhibit AL. And that figure of course, the value of those suits, \$20,550, you will remember is the second large item which the defendant contends should be included in his net worth as of December 31, 1944, the beginning point. His Schedule 3 shows that those suits are on hand as of the end of the year. I might state that the understanding of the Government was that inventory figures for the Army & Navy Store for the three years in question covered the Goodman transaction and it was not until September 25, nine days after the trial began, we became aware for the first time that the defendant would seek to include those suits as additional inventory. Now to believe the defendant's story in connection with the Goodman suits you are going to have to believe and accept a number of correlary things that I think are simply beyond the bounds of credibility. In the first place you have to assume that those suits were bought and sold without the enjoyment of any profit or the suffering of any loss. It is by the defendant's explanation a complete [1358] wash entry, no hits, no runs, no errors. I don't see how you can believe it. And that, ladies and gentlemen, was in 1944 when every witness who knew anything about it, no matter whether he was called by the United States or the defense, testified they were in very, very short supply, they were hard to get. And Mr. Olender would have you believe that he acquired 822 of them and he got rid

of all of them and it came out just precisely even-Stephen. You believe it? I can't.

He would have you believe secondly that although the suits were purchased, by Mr. Olender's own testimony, in the opening months of 1944, January, February and March, he had 322 of them left on December 31, 1945, almost two years later. In the middle of the war he had 322 of them left. Do you believe it? It is more than I can accept. It just isn't in the cards, as I understand the conditions that existed in those days and as the witnesses had testified. To believe Mr. Olender's story that all of those suits were on hand at the end of '44 and he testified that he didn't include them in his 1944 inventory as reported on his Federal income tax return, there are two views which you might take of that, as I am sure the Court will instruct you. The law requires that income tax returns be truthful and accurate, and they are executed and filed under the penalties of perjury. Now if Mr. Olender knowingly failed to include those suits on [1359] his return with intent he has committed a crime. Of course he is not charged with that. He is being tried here for income tax evasion, wilful attempt to evade his income taxes. So whatever he did in connection with inaccurate filing of returns is not material insofar as the results of the offense are concerned with which he is being tried now.

If you don't—well, put it this way, if you believe he didn't have the suits, then his income tax return for 1944 is correct, but his whole defense falls. If you believe that he did have the suits and know-

ingly and intentionally failed to report them on his income tax return, then you may consider that in your determining as to whether or not he intended to commit the crime with which he is charged.

To believe the defendant's explanation of the Goodman transaction you have to believe that all suits that he got from Goodman were large sizes, and I read from the record:

“Q. It is your testimony that they were primarily large sizes?”

“A. They were all large sizes.”

I want you to examine the Government's Exhibits 38 and 39. These are the invoices that Leavy gave to Mr. Lerman, you will remember. Note that they bear the name George Goodman Sales Agency, 44 West Avenue, the address on the top. They also have Mr. Leavy's name on them in the lower left hand side, about halfway down, and there is a distribution [1360] of sizes shown. You will examine those (handing to Jury.)

Mr. Olender said categorically that they were all large sizes. As you have seen, those two invoices show a distribution of sizes from 35 to 40. Mr. Lerman testified and was examined on the question. I examined him on cross-examination. Mr. Lerman testified that he was an old friend of Olender's, had known him fifteen years, he saw him every week, they belonged to two or three clubs together. We might have thought that Mr. Lerman would go down the line for Mr. Olender. Did he?

Mr. Hagerty: If your Honor please, I cite that

as misconduct. We presume every witness tells the truth.

The Court: Counsel is entitled to, as you are, to make comments upon the credibility of a witness or upon that of the defendant, and he can use such colloquialisms as he desires.

Mr. Drewes: These were the questions and the answers:

“Q. Mr. Lerman, you testified that the majority of sailors in your experience were size 36 and size 38. There were many, many sailors who were larger than that, were there not?

“A. Yes. But as a rule the kids who used to be in the Navy, they were small boys.

“Q. But there were many who were not? [1361]

“A. That’s true. But I say the majority is 36 and 38.

“Q. With respect to the U. S. Exhibits Nos. 38 and 39, which are the invoices that you have identified, I call your attention to No. 38, which shows ten size 35’s. Did you get those suits?

“A. Well, I couldn’t remember that far back if I did or didn’t. But I remember this, that if we did get them, they were not to the size. I mean they were not—35, maybe 38.

“Q. The other invoice, Exhibit No. 39, there are fifteen size 35’s. Didn’t you get any size 35’s?

“A. Possible.

“Q. Both of these invoices are dated in 1945, in May, and that was the date of the transaction?

“A. That’s correct.

“Q. And that was some approximate seven years ago? A. That’s right.

“Q. And can you say now that you got no 35’s, no 36’s, no 37’s?

“A. If I got—received any, it was a very small proportion of what they should be, if I received any. But, however, I can’t recollect that far [1362] back.”

That is a long—that is a far cry from supporting Mr. Olender’s contentions that they were all large sizes.

In order to believe Mr. Olender’s explanation of the Goodman transaction you have to believe that although the suits which he got were all too large and unsatisfactory and he couldn’t use them.

Nevertheless, in the same year he later purchased another lot of suits from Mr. Goodman, some \$1,380 worth, as I remember. Why would he buy again from Mr. Goodman if his first experience was as unsatisfactory as he would have you believe?

In order to believe the Goodman transaction you have to believe that the 322 suits which he says were in inventory at the end of 1945 and which he identifies as Goodman suits and which are shown at a price of \$24.50, were priced in error. He contends that Goodman suits cost \$25. The defendant’s Exhibit N, which I believe you have seen before, shows 322 suits as of the end of the year at a price of \$24.50.

Here is the defendant’s Exhibit V, an invoice from the Dewey Sales Company, covering 100 suits at a price of \$24.50. Now that is dated March 8,

1946, which is three months after the closing inventory. There is no contention that the 322 suits shown in defendant's N at \$24.50 were these suits.

But isn't it more reason to believe that they were other [1363] suits which had been purchased at \$24.50? This exhibit establishes the fact that he was buying suits at that price. Do you believe that the \$24.50 is an error and that it should be \$25 or do you believe that the 322 suits were not Goodman suits but were suits purchased from someone else at \$24.50?

That leads me to the next point. To believe the Goodman transaction you have to believe, as I stated just a moment ago, that although these suits were purchased in early 1945, 322 of them were still in stock almost two years later. The Government Exhibit No. 54 shows that during the year 1945 Mr. Olender purchased 1578 suits at total cost of \$35,656, and that many of them were purchased late in that year. Do you believe that the 322 suits that were in inventory were purchased almost two years before or do you think that the 322 suits were the remainder of those purchased in 1945?

I don't believe you can accept the story, ladies and gentlemen. I don't think the mind can accept all of the various aspects of that story. It is too much. He is asking too much of you.

I will tell you what I think happened. As you know, the Goodman transaction has its origin in another investigation, and Mr. Blanchard questioned Mr. Olender in connection with his purchases from Goodman, and Mr. Olender didn't know any-

thing about it. He couldn't recollect anything except that \$1,380 purchase which came later. [1364]

A little later on Mr. Olender himself was under investigation, and very early therein, in 1948, Mr. Root was over in his store looking at his books. Mr. Root asked him about the Goodman transaction and he still didn't remember anything about it. But then the agents found the Lerman transaction, the \$5,000 you will remember was credited to his capital account, and the agents found it and they found the Saraga transaction, which is the \$7,000, and you will remember that the proceeds of that check went into his personal account. There he was. Now he had three transactions to explain, the Goodman transaction, of which he had no record whatsoever, and heretofore had no recollection, no part of it was on his books; then he had the Lerman transaction and the Saraga transaction. What to do? Well, he thought the Government's got the Lerman transaction. We've got 200 suits there that I sold and the proceeds have gone into my capital account. The price is \$25. I've got the Goodman transaction, which doesn't appear anywhere, and I have to explain the Saraga transaction. What will we do? Well, we will divide the \$20,550, that the agents know about—Blanchard questioned me about that—by \$25. There are no invoices at all, no record at all. We divide that figure by \$25, and we get 822 suits. Now we've already accounted for 200 of them in the Lerman transaction. Now what about the Saraga? Well, we'll divide that by \$25, and what will we get there? We [1365] get 280 suits. Well,

that leaves us with 242 suits left. What to do about that? He looks at his inventory records and at the end of 1945 there are 322 suits. Oh! You multiply those by \$25. That takes care of another big chunk of the \$20,550. There is only one thing left, we've got 20 more suits to account for. What happens to those? I sold them over the counter.

He has explained the Goodman transaction, the Lerman transaction, the Saraga transaction—if you believe him.

Do you believe that he couldn't get rid of those suits in almost two years? He had 322 of them left? Do you believe that the whole transaction was without profit, without loss, with the exception of possibly 20 suits that were sold in the store? They would be at a profit. Do you believe that the ending inventory price was a mistake? Do you believe that the 322 suits on hand at the end of 1945 were suits purchased two years before when he purchased over 1500 suits in that year, that very year—almost 1600 suits? I don't see how we can believe it.

Mr. Hellman testified that by including the value of the so-called Goodman suits at the end of 1945 in the inventory and not including them in purchases that the defendant thereby overstated his profit for the year 1945. You remember that? And I asked him on cross-examination to calculate what the actual gross profit ratios were for 1944, 1945, and [1366] 1946, and lo and behold 1945 was the lowest gross profit ratio of any one of the three years.

Then ask yourselves this, if that is so, were the

Goodman suits picked up on inventory for the first time and was there an overstatement of profit resulting therefrom? The question brings with it, I think, its own answer.

I wonder if we may take the recess, your Honor?

The Court: Take the afternoon recess, ladies and gentlemen, with the same admonition to you not to discuss the case or form an opinion until the matter is submitted to you.

(Short recess.)

Mr. Drewes: Now I want to discuss with you the so-called Lerman transaction, the two invoices pertaining to which you have already examined. Mr. Leavy testified concerning that transaction, and I want to read this particular part of it to you. This is Mr. Leavy who allegedly sold the suits to Mr. Lerman:

“Q. In the course of that transaction did you ever tell Mr. Lerman the source of these suits?”

“A. No, sir, never told him who they came from.

“Q. Why didn’t you?”

“A. Because I don’t believe that Mr. Lerman would have bought them, and I don’t believe Mr. Olender would have sold them to Mr. Lerman on account of competitors.” [1367]

Mr. Hagerty: I don’t mean to interrupt you. Could I have the page you are reading from?

Mr. Drewes: Page 153, Mr. Hagerty.

I will read that again.

“A. Because I don’t believe that Mr. Lerman would have bought them, and I don’t believe Mr.

Olender would have sold them to Mr. Lerman on account of competitors.”

Now Mr. Lerman testified yesterday, and part of his testimony is as follows:

“Q. You were very glad to get those suits (referring to the so-called Goodman suits, the 200 sold through Mr. Leavy to Lerman). You were very glad to get those suits, weren’t you?

“A. Very much so.

“Q. As a matter of fact, not long ago in my office you said that they were just like gold to you?

“A. That’s right.

“Q. You remember that. You have known Mr. Olender for quite some time, have you not, Mr. Lerman? A. Yes, I have.

“Q. About how long?

“A. Oh, I imagine about—I have known [1368] him off and on for at least fifteen years or maybe longer than that, but more closer since I went into that line of business.

“Q. And speaking of that ‘that line of business,’ during the years in question?

“A. During the years 1942 to 1947.

“Q. Between the years 1942 and 1947 did you sometimes buy merchandise from Mr. Olender when you were short and did he sometimes buy merchandise from you?

“A. Well, there was a reciprocity between dealers to help one another.

“Q. And you sometimes helped Mr. Olender by giving him merchandise when he was short and—

“A. Occasionally.

“Q. ——and he sometimes helped you by giving you merchandise when you were short?

“A. Occasionally.

“Q. You would say, would you not, that you were friendly competitors? A. We were.

“Q. And is it not true, Mr. Lerman, that you and Mr. Olender belonged to clubs, the same clubs in Oakland? A. That is true. [1369]

“Q. What clubs do you belong to?

“A. We belong to the Lion’s Club, belong to the Shriners’ Club, the Athens Athletic Club.

“Q. Do you see Mr. Olender almost every week?

“A. Practically every week at luncheon on Wednesday, particularly the Lions Club.”

Now the record in the case shows in connection with this particular transaction that Mr. Lerman drew two checks, which are the Government’s Exhibits 43 and 44, each in the amount of \$25, and they were payable to the American Trust Company.

Mr. Hagerty: Mr. Drewes, I think you said \$25. Isn’t that \$2,500?

Mr. Drewes: I beg your pardon. Yes, \$2,500, payable to the American Trust Company. He then went down to the American Trust Company and purchased the Government’s Exhibits 34 and 35 in the same amount, cashier’s checks payable to Mr. Leavy in each case, and the register of the American Trust Company, which are these two exhibits, 36 and 37, tie the two in together and show that the personal checks of Mr. Lerman were used to purchase those two cashier’s checks. And he went to Mr. Leavy and got 200 suits, and Mr. Leavy

made out these two invoices, which you have, Exhibits 38 and 39. But they are made out on the invoices, which are printed invoices of the George Goodman Sales Agency in New York. [1370]

Well, now, why? What's the answer? Mr. Lerman and Mr. Olender are old friends. They belong to the same clubs. They are friendly competitors. They help each other out. One man provides the other with goods when he is short. Mr. Lerman said that the suits were just like gold to him. Why didn't Mr. Olender walk across the street—the two places of business are very close together—and say, "Hey, Lerman, I have some suits from Goodman. I haven't got a tailor. I can't use them. Would you like them?" And Lerman would say, "They're just like gold to me. How many have you got?" And Mr. Olender would say, "Two Hundred." He may say the whole 822, the inventory. Whereupon Lerman would say, "I'll take them," and sit down and write out a check on Lerman's own account, just pay to Milton Olender \$5,000 and hand him a check. Isn't that what you would expect with that relationship existing between the two parties?

But, no. What does Lerman do? He writes out his own checks payable to the bank, gets two cashier's checks payable to Leavy, gives them to Leavy and gets back these two invoices on the George Goodman Sales Company letterhead.

What sense does that make? What's the purpose of all that devious turning of corners? What is the purpose of it all? What's the purpose of it all? Why not walk across the street and say, "Look,

I've got the suits. Do you want them?" [1371]
"Sure."

Well, I'll tell you what I think. I don't know, and the only people that know are Leavy, Lerman and Olender, as the record shows now. It's unexplainable. There is no sense to it. I have a theory. I'll tell you what it is. These Goodman sales invoices are pure phoneys. Leavy, Lerman and Olender are covering their tracks. And why are they covering their tracks? Why this peculiar, distorted, exaggerated means of handling what ought to be a very simple transaction between two friends, one of whom had suits he didn't need, the other of whom wanted suits very badly? Why? I think it is because Mr. Leavy, Mr. Olender and Mr. Lerman were all involved in the illicit trading in sailor suits in violation of Government regulations at that time. In other words, they were dealing in the black market, all three of them. Mr. Leavy was buying the suits. He was the man that had the contacts. He was going east or wherever one goes to get sailor suits in getting them, and Mr. Olender was the banker. He was handling the funds and he was handling them out of his cash in the safe deposit vault in the bank, and Mr. Leavy got suits somewhere and they were shipped out to San Francisco or Oakland and 200 of them were Mr. Lerman's share. Mr. Olender had already paid for them, financed it out of cash out of the vault, and when Lerman got his suits he reimbursed Mr. Olender for his share of the suits, and he didn't just write out a check and hand it to Mr. Olender. He covered his [1372] traces by buying

cashier's checks, giving them to Leavy and getting in return these two ostensible invoices. Whose suits? Nobody knows. But Mr. Leavy got them some place and Mr. Olender paid for them and Mr. Lerman's share was \$5,000 and he paid it to Mr. Olender for his share of the suits in this devious manner shown.

Counsel has called my attention to a part of the record which had slipped my mind. Specifically this, Mr. Leavy had no returns of these transactions either. Here is Mr. Leavy's testimony:

"Q. Do any of the transactions in which you engaged on behalf of Mr. Olender to which you have testified appear in your books?

"A. You are talking regarding sailor suits?

"Q. That is correct, the sailor suits, the transactions to which you have testified.

"A. No, sir, for the reason that I was not in that business. I just acted as an agent and buying those sailor suits for Mr. Olender, I just done it as a favor for him because they were very difficult to get at that time."

What I have just said to you is a theory, it is a hypothesis, but it makes sense, and certainly the transaction, the Lerman transaction, as it stands in the record unexplained now makes no sense whatsoever. There is no reason in the [1373] world why a man who knew each other as well as Lerman and Olender did would find it necessary to handle a transaction of that kind in the way it was handled. According to Mr. Olender's story he had suits that he couldn't use because he had no tailor and they were too big. According to Mr. Lerman he had a tailor and they were just like gold to him. And

they met every month—pardon me, they met every week at clubs to which they both belonged. Why handle the transaction, why cover traces, why issue invoices covering sales on the letterhead of a firm in New York, why use cashier's checks instead of writing a check directly from Lerman to Olender? I have suggested to you my explanation.

Now referring again to the Schedule 3, as you know it, that has been referred to most commonly in this trial as defendant's Exhibit AK. You will note that the defendant has reduced the net worth for 1945 and 1946 by deducting therefrom \$20,000, which is the value of the bonds which, according to his testimony, were the property of his mother, and, of course, it is to his advantage to reduce the net worth in those two years, as I have previously explained to you.

Now we think that the bonds belonged to him, the taxpayer. In the first place he had possession of them. They were in his safe deposit box. In the second place, he reported the interest on those bonds on his 1947 income tax [1374] returns. That he admitted when he testified on the stand. You recall he had furnished to Mr. Ringo information upon which his 1947 and 1948 returns were based, and when it was pointed out to him that the difference in interest shown in the two was \$450 and that that would be the interest at two and a quarter per cent on the \$20,000, he stated that that was the interest, the \$450 that he had returned in 1947 was indeed the interest on his mother's bonds. But he says, "My mother returned the interest on her in-

come tax for the preceding year 1946." And that is the defendant's Exhibit AK.

The income tax return, as probably many of you know, provides for the reporting of interest and dividends only in a lump sum, so by examining this return, as indeed any return, in the absence of any further information it is impossible to tell from what source that interest came or from what source dividends were received, and so the defendant's testimony that his mother reported the interest the preceding year is unsupported—that is, his own testimony, is unsupported by any documentary evidence in the case. He testified that his mother returned interest on the \$20,000 in 1948, which, of course, was the next year. But I, of course, refresh your recollection by calling your attention to the fact that that was after the investigation began in this case. The 1948 return would not have been filed until [1375] the early months of 1949.

Now, ladies and gentlemen, the Government insists that its net worth figures are substantially correct and the Court will charge you, I am sure, that the Government need only prove a substantial understatement of taxable income.

I am going to demonstrate to you why we insist that our net worth in 1944 is correct by approaching the matter in another way. You probably long since have forgotten that very early in the trial I introduced into evidence the income tax returns of the taxpayer for the years 1942 and 1943 as well as 1944, and they were introduced over the objection of counsel as being immaterial, and I pointed out

to the Court at that time that the purpose of putting those returns in was to support the starting point, the net worth as of the beginning period, 1944, and we also put into evidence certain forms and reports which are called certificates of assessment, and I explained to you at that time that they were calculations by the Bureau of Internal Revenue as to taxes actually paid during the years in question, and the certificates which were permitted into evidence covered the periods 1942, 1943, 1944, and 1945, and I think even beyond that.

Now my purpose of doing that was also to further support the Government's base period. Government's Exhibit No. 24 admitted into evidence is a comparative net worth statement [1376] which was prepared by Mr. Ringo for Mr. Olender and submitted to the Bureau of Internal Revenue at the request of the agents. It has been subscribed and sworn to by Mr. Olender, as you will note. I am going to ask you to examine this just briefly, with particular reference to the net worth figure which is shown for December 31, 1941. (Handing to jury.)

Now I have put on the board his sworn net worth as of the last day of December, 1941.

To that adding income 1942—Is this angle all right? Can you see it—1942—1944. Now this is as reported on the returns which are in evidence for those years. And the figure is \$89,431.60, giving a total of \$228,335.51. Now, as you know, from that must be deducted taxes paid for those years, and they are included in the certificates of assessment that I referred to just a little while ago, and they

amount to \$16,871.07. That results in an indicated net worth of \$211,464.44 as of December 31, 1944.

Now the Government's computation of his net worth as of the last day of December, 1944, is \$191,002.07. The difference between the two is \$20,462.37. So the beginning net worth as contended for by the Government in this case and the net worth as reconstructed, going back to 1941, as I have just done, beginning with the sworn net worth of the taxpayer [1377] in 1941, adding his income as reported, deducting taxes, is only \$20,462.37 difference.

Now what about living expenses? If we divide the \$20,462.37 by three we get something under \$7,000 a year. He has got to be charged something for living expenses. The \$20,000 could be living expenses. Do you think it is unreasonable for a family of five, the head of which has assets of \$138,000, nearly \$139,000, in 1941? Do you think it is unreasonable for that family to spend as much as \$7,000 a year living expenses? I don't think it is unreasonable. And the stipulation in this case shows that the Olender family spent \$24,000 in non-deductible living expenses in 1946 alone, and \$19,000 in 1945, and purchased \$24,000 worth of furniture at W. & J. Sloane in 1946, paid for in the next year. You have seen the Magnin's and the Gray Shop bills. Do you think it's reasonable that that family would spend \$7,000 a year in those three years and thus account for the \$20,000 difference between the Government's net worth in 1944 and the net worth

as reconstructed from 1941? I think it is entirely reasonable.

But even if you disagreed with me, even if you disagree with me, you have got to allow something, some reasonable figure for living expenses, and if you do—then where is the Goodman transaction?

Now we start in 1941 in our calculation here, long [1378] before Mr. Goodman ever got himself into this case, long before. What about the cash in vault? Where is the room for that? You know the answer—there isn't any room. The Government's calculation is substantially correct. There may be a little leeway, a thousand dollars here, a thousand dollars there. There is no room for \$22,000 cash in bank and there is no room for \$20,000 in Goodman suits.

Now would you be kind enough to turn to Schedule 3-A. I want to discuss with you briefly the three items which appear under "Non-taxable gifts received."

If your Honor please, I have misplaced one of my references to the transcript.

The Court: It is approximately four o'clock. I suggest we resume at ten o'clock tomorrow morning, ladies and gentlemen, with the same admonition to you not to discuss the case nor to form an opinion on the matter until it has been submitted to you.

(Thereupon the adjournment was taken until ten o'clock a.m., Thursday, October [1379] 9th, 1952.)

October 9, 1952—10:00 A.M.

The Clerk: U. S. vs. Olender, on trial.

Mr. Drewes: Ladies and gentlemen, following argument yesterday afternoon my colleagues called my attention to the fact that I had made an error when I told you that in 1945 the defendant was charged with non-deductible living expenses per the stipulation of \$19,000, and with non-deductible living expenses of \$24,000 for the year 1946. I had overlooked the fact that the non-deductible expenditures in the amounts that I have just mentioned, which are on the stipulation, also included taxes paid in those two years. So if taxes are taken out of the figure, we find that in 1945 the defendant and his family spent \$16,341.94 for living expenses and in 1946 something over \$17,000. I beg your pardon again. I have made still another error, and I hope that you in view of the complexity of these matters won't hold it too much against me. The figures which I gave you are not the living expenses but the tax figures and therefore the difference is approximately—put it this way, in 1945 the defendant and his family spent approximately \$3,000, and in 1946 approximately \$7,000.

Is that correct, Mr. Shelton?

Mr. Shelton: Yes.

Mr. Drewes: Those are the living expenses with which he [1380] is charged, the smaller figures. The larger figures are the tax figures.

It was quite late in the day when I explained to you our computations in support of the Government's beginning net worth. It will take only

a moment—I think it might be wise if I did that again for you. These are figures on the board.

The figure, Government net worth, \$191,000—that is the 1944 beginning point—and that is shown on the Government schedule which you all have.

Net worth as of December 31, 1941, \$138,903, is the net worth for 1941 as submitted to the Government by the taxpayer, and you examined that particular exhibit, that is, No. 25.

Now the defendant would have you add to our figure of \$191,000 over \$40,000 in two items alone, \$22,000 beginning cash, and the \$20,550 which is the Goodman transaction, and, of course, if you adopt that view of the matter, then the understatement for the year 1945 is substantially eliminated.

So to test the validity of the Government's beginning net worth, we start with the net worth as submitted by the taxpayer, and it is to his advantage, you recall, to make that figure as large as possible at all times, and you recall that that was long before the Goodman transaction began and long before any gifts were—any alleged gifts could have been received by the defendant from his mother. [1381]

So starting with the \$138,900, which is the net worth as of 1941, we add the defendant's income for 1942, 1943, 1944, as shown by his returns for that year, which is the \$89,000 plus, and we get \$228,000 plus. Then we deduct from that the taxes which he paid in those years, \$16,871, and we arrive at a figure, net worth figure, a raw figure of \$211,464.

Now the difference between this figure and the Government's beginning net worth is \$20,462.

Now out of that \$20,000 something has to be deducted for the living expenses of the family, of Mr. Olender and his family. If you believe that it is reasonable to conclude that he spent as much as \$7,000 a year during those three years, the entire \$20,000 is accounted for and the Government's beginning net worth is substantially correct.

I submit to you that what you have now learned of the personal affairs of this taxpayer and his family, that's entirely reasonable. But, in any event, you have to allow something for living expenses, and no matter what you allow there is no room to include the Goodman transaction, and there is no room to include \$22,000 of additional cash. It just does not fit.

So I submit to you that the Government's beginning net worth of \$191,000 is substantially correct.

Now will you turn to the defendant's Schedule 3A that is [1382] in evidence, the original, as the defendant's Exhibit AK. There you will see that he has in 1945 deducted \$6,075 from his income. Now that is deducted because that is income (if you believe he received it) which came to him by way of gift and was not taxable. That consists, as you see, of three items, and I want to take those up with you in turn.

The first is the \$3,000 gift allegedly received from his mother on January 2, 1945. Now that is one of three which appear, you will recall, on Schedule 4.

You might just look at that briefly. That appears as the first item in 1945 as an addition to the safe deposit box, Schedule 4, and then if you look above in 1944 you will see a gift from mother \$2,500 on July 5, and \$1,000 on December 15.

Those three gifts are three of five gifts which the defendant testified he received from his mother. The first one was received, according to the defendant's story, on February 3, 1942, in the amount of \$1,000, and the second on March 31, 1943, in the amount of \$1,000. Those two, of course, are not included in the defendant's exhibit and in Schedules 3, 3A and 4, because they were allegedly received in the years prior to the years with which we are concerned. Nevertheless, the testimony as to all five is substantially the same.

Now the taxpayer testified that he received those gifts [1383] in those amounts on those dates and he testified that they came from the Fresno bank accounts of his mother. Now as to the three—

Mr. Hagerty: Now, if your Honor please, I think that is a misstatement of the evidence.

Mr. Drewes: I intend to read the record, your Honor.

Mr. Hagerty: He testified where it came from.

The Court: Counsel said he intended to read the record.

Mr. Drewes: This is preliminary. I am going to read the record.

The Court: All right.

Mr. Drewes: As to the three later gifts which are included in the schedules that you have, he

testified on direct examination—Mr. Hagerty, I believe, was questioning him, and then as to all five he testified again on cross-examination when I questioned him. Now as to those five transactions, when I examined him, he testified as to—without any doubt or without any equivocation at all, as to the first four of them. When he got to the fifth one he must have had an intuition, he must have had a feeling, a sixth sense that he was getting into trouble, and he waived just a little bit, and then he gained heart and came back again.

Let me read that to you. First I am going to read his [1384] testimony on direct examination beginning at page 416:

“Mr. Hagerty: Oh, I am sorry, it is Exhibit 25 for identification. 24 is in evidence—Government’s Exhibit 25 for identification, the last sheet thereon indicated as being Schedule A. Does that, after reading that, does that refresh your memory as to gifts you received from your mother? A. It does.

“Q. Could you tell us what gifts you received and when you received them as outlined there?

“A. You wish them from 1942 on?

“Q. No, just during the period that is involved, 1944, ’45, ’46.

“A. On January 6th, 1944, there was a \$2,000 gift. On July 5, 1944, \$2,500. On December 15, 1944, \$1,000. On January 2, 1945, \$3,000.”

Now, those are the three amounts, the three dates that came from his mother by his story. Those are the three items which you have in front of you in the schedules.

Now I questioned him on cross-examination and this begins at page 456:

“Q. I show you, Mr. Olender, Government’s Exhibit 24 for identification, particularly with respect to Exhibit 7, Schedule A. You testified this morning, Mr. Olender, that that schedule [1385] represents gifts from your mother to yourself, is that correct? A. Yes, sir.

“Q. And I note that the schedule is entitled, ‘Withdrawals from savings accounts in Fresno.’ What is meant by that, Mr. Olender?

“A. That is where the funds came from.

“Q. From what savings accounts in Fresno?

“A. She had two savings accounts in Fresno.

“Q. Where were they?

“A. One in the Bank of America, one in the Security First National Bank.

“Q. And where, for example, in the first item where the date is shown as February 3, 1942, and the amount of \$1,000, does that mean that there was a withdrawal from one or the other of those two banks on that date? A. Yes.

“Q. And in that amount? A. Yes.

“Q. And on March 31, 1943, your mother withdrew \$1,000 as a gift to you? A. Yes.

“Q. And withdrew it from one or the other of those two banks? [1386] A. Yes.

“Q. Similarly on January 6, 1944, she withdrew \$2,000 from one or the other of those two accounts and gave it to you? A. Yes, sir.

“Q. What disposition did you make of those funds, if you recall?

“A. Some of it I put in my safe deposit box, some I used in other ways.

“Q. Well now, you state that you put it in your safe deposit vault. In what form?

“A. Currency.

“Q. She made the withdrawal and gave it to you in currency? A. Yes.

“Q. On July 5, 1944, did she withdraw \$2,500 from either of those two accounts and give it to you?

“A. It says so in there.

“Q. Was that true? A. Yes.

“Q. And on December 5, 1944, she withdrew \$1,000? A. December 15.

“Q. I beg your pardon, you are correct. [1387]

“A. Yes.

“Q. And on January 2, 1945, she withdrew \$3,000 from either one of those two accounts and gave it to you in currency? A. Yes, sir.

“Q. In every case it was currency?

“A. Yes, sir.”

Now, he begins to, I guess, smell a rat. He loses his courage.

“Q. And you put it in your safe deposit vault or made some——

“A. I don't know where I put it. I put it somewhere.

“Q. Other than your safe deposit vault where would you have put it?

“A. I might have deposited it in one of my accounts, I am not sure.

“Q. Would your bank records show deposits of those sum as of any of those dates?

“A. They may or may not, I don’t know.

“Q. You could examine your records for us, couldn’t you, and let us know?

“A. Yes, I could. I haven’t.

“Q. But there is no question in your mind that with respect to Exhibit 7 which is in front [1388] of you as to each one of those accounts your mother withdrew that sum from either one of the two banks which you have designated on the dates shown and gave the money to you in cash?

“A. I am not positive that the money that came out of those banks was given to me. She may have taken money those same dates from some other place, but she definitely withdrew that amount of money on those dates either from the bank or some other bank and gave the money to me. But there are positive withdrawals on that date, and I checked with my mother to make sure they are correct.”

Then he takes heart.

“Q. There are positive withdrawals on each one of those dates? A. Yes.

“Q. And the money was given to you?

“A. Yes.”

Now, ladies and gentlemen, what does the record show? Here are the official records of the Bank of America in Fresno, where Mrs. Olender had her account. This is the official record of Mrs. Olender’s account in the other bank which she used, the Security First National Bank. And you recall Mr. Whiteside testified that he was unable to locate any other bank accounts of Mrs. Olender. The

record [1389] shows that on February 3, 1942, Mrs. Olender withdrew from one savings account, she withdrew \$1,000, and put it in another savings account and there was no subsequent withdrawal of a similar amount. On March 3, 1943, she withdrew \$1,000 from her savings account and had put it in her commercial account, and there was no withdrawal of a similar amount. On January 6th, 1944, she withdrew \$2,000 and put it in Terrys Olender Gambor's savings account. She, you will recall, is the sister of the taxpayer. There had never been any withdrawals from that account. On January 5, 1944, she withdrew \$2,500 from the Security First National Bank. The withdrawal slips cannot be found and nobody knows what happened to that sum. On December 15, 1944, she withdrew \$1,000 from her savings account and put it in her commercial account, and there were no similar withdrawals. On January 2, 1945, she withdrew \$3,000 from her savings account and put it in Terrys' savings account, from which there have never been any withdrawals.

Mr. Hagerty, unquestionably, or Mr. Lewis, in behalf of the defendant, is going to tell you that Mr. Hellman testified that Mr. Olender told him that there were duplicate gifts made to Terrys and to the taxpayer. But the bank records don't support it.

There were no duplicate withdrawals, just the withdrawals in the amounts and on the dates that I have read to [1390] you, and with respect to two of them they went into the commercial account of Molly Olender.

Ladies and gentlemen, that evidence speaks for itself. The taxpayer's story is false and is not to be believed in any part. The gifts which he has indicated as coming from his mother on Schedule 3 and Schedule 4 could prove it never to have been received.

The next item on Schedule 3A, he deducts \$575 which he received in 1945 (by his testimony and by the testimony of Mrs. Widrin who, you remember, appeared very early in the trial.) She testified that she had given the money to the taxpayer.

The defendant's Exhibit AE, his personal checks, show that on August 26, 1945, he drew a check payable to the Belmont Memorial Park in the amount of \$510. They show that on August 26, which is the same date, he drew a check in the amount of \$50 payable to a florist. On September 12th, 1945, he drew a check in the amount of \$407.27 payable to N. Gray & Company. And on September 12th, 1945, he drew a check in the amount of \$51.39 payable to a florist. I stand corrected. The August 26th payment of \$50 was to a funeral home, I believe. It is difficult to read the name of the payee.

The money he got in 1945 from Mrs. Foote he immediately or very shortly thereafter expended for the purposes indicated, [1391] and the money having come in and gone out in the same year, that item has no place on Schedule 4.

Now finally with respect to Mrs. Foote's \$2,500. The defendant testified that he had received a sum

of money from Mrs. Foote. On page 411 of the transcript, questioning by Mr. Hagerty:

“Q. In the year 1945, did you ever receive any funds from Mrs. Foote?

“A. I received \$2,500 from Mrs. Foote.

“Q. And would you explain the transaction to his Honor and the ladies and gentlemen of the jury?

“A. Well, Mrs. Foote had been saving considerable money for several years, and she was in her eighties, she had lived with me since practically the day I was married, until 1939, and she gave me that money for a specific purpose.”

He testified that she had been saving up the money for a period of years and gave it to him for a specific purpose. Later in the trial, in response to questions asked of him by Mr. Shelton as follows:

Page 891:

“Q. Is it now your testimony that \$3,000 of that money was or was not money of your mother-in-law’s, Mrs. Foote? A. It was. [1392]

“Q. It was money of your mother-in-law’s, Mrs. Foote? A. That’s right.

“Q. Under what circumstances did your mother-in-law give you that \$3,000?

“A. Part of it gave from Mrs. Widrin, as she testified, and I had the balance and I had the money in my safe deposit box.”

That is in 1945. Now, in the first place, ladies and gentlemen, the money isn’t shown on Schedule 4 as being in the safe deposit box. That very care-

ful reconstruction of what happened to the money, the source of which nobody understands, the \$2,500, the source of which is testified to, is not on Schedule 4. But, secondly, of greater importance, the record shows that Mrs. Foote never had \$2,500. We put it into evidence, and I read to you extracts from the official records of the Department of Public Welfare in Fresno County. Mr. Jensen testified that Mrs. Foote had been on relief from 1936 until 1943, and the records which are in evidence show from bank reports, from investigations conducted by the social service workers, from statements by Mrs. Foote herself, that during the period, at least from 1939, which was the date, you remember, she transferred from Oakland to Fresno County, that at least in 1939 the most she ever had was \$152 and some cents in a joint account in Oakland with Betty Olender. The conclusion again, I think, leaves no doubt there never was a [1393] \$2,500 belonging to Mrs. Foote and Mr. Olender never received it.

The defendant's story, ladies and gentlemen, is about 95 per cent fabrication. As His Honor will instruct you, if you find the defendant has testified falsely in any material respect, you may consider all of his testimony—you may disbelieve all his testimony.

I want to point out to you some thirteen instances where the record shows that the defendant either contradicted himself or was contradicted by competent evidence of other witnesses or in the records which have been admitted into evidence in this trial.

1. He testified on this trial at great length as to

the details of the Goodman transaction. This is 1952. In 1948 he told Mr. Blanchard that he had no recollection of any of the details of the Goodman transaction save and except the \$1,380 transaction which occurred later. You recall that Mr. Shelton questioned Mr. Olender in connection with his sworn statement to Mr. Blanchard. Here is the record, beginning at page 813:

“Q. (By Mr. Shelton): Mr. Olender, I will ask you if, in the course of that statement, you were not asked the following question and did not give the following answer, and if the Court and jury please, this is the second question on the [1394] statement:

“‘Q. At this time it becomes my duty to advise you that under the Constitution you are not required to incriminate yourself, and to inform you that anything you may say, and any documents that you may produce at this hearing, can be used against you in any proceeding which may hereafter be undertaken by the government. Do you understand that?

“‘A. Yes, I do.’

“Now, Mr. Olender, were you asked that question and did you give that answer?

“A. I presume I did.

“Q. I will ask you if you were not asked the following questions and did not also give the following answers as indicated?

“‘Mr. Olender, in the year 1944 did you have occasion to do any business with a George Goodman? A. Not directly.

“ ‘Q. You did not have any relationship with him? A. Not that I remember.

“ ‘Q. Not that you remember?

“ ‘A. Not that I remember. [1395]

“ ‘Q. Did your store have any?

“ ‘A. Just one invoice, whether it was with him or not, I do not remember how that deal came about.’ ”

Then Mr. Shelton asked him:

“ ‘Were you asked those questions and did you give those answers? A. I believe I did.

“ ‘Q. I will ask you if you were asked the further question and gave the answer as follows:

“ ‘Q. I show you a check dated September 25, drawn on the Bank of America National Trust and Savings Association, No. 1806, and ask you whether that is the check drawn by you in payment of that invoice?

“ ‘A. It is.’ ”

And then Mr. Shelton:

“ ‘One further question and answer:

“ ‘Q. Is that the only money that you paid to Mr. Goodman?

“ ‘A. The only money that I know of.’ ”

And then Mr. Shelton:

“ ‘Now, Mr. Olender, I will ask you whether or not that first question of those two was not related to the \$1,380 Goodman transaction which is [1396] on your books and which has been testified to on this trial?

“ ‘A. It could be, I don’t remember it.

“Q. I will ask you further if you were not asked the following question after some transactions had been outlined:

“‘Q. But otherwise than the foregoing transaction’—

and it is singular, evidently referring to the \$1,380 transaction—

‘you never purchased any other sailor suit or merchandise from Mr. George Goodman?

“‘A. To the best of my knowledge and belief, no.’

“Were you asked that question and did you give that answer? A. I presume I did.

“Q. I will ask you if you were asked the following further questions and gave the following further answers:”

This is by Mr. Blanchard:

“‘Q. Can you tell me when those transactions were had?

“‘A. I do not remember. They were in February [1397] of 1944, I believe.

“‘Q. You had no transaction of any kind?

“‘A. No record of any such transaction.

“‘Q. Your records do not disclose any such transaction? A. No.

“‘Q. This was in 1944, I see. Well now, Mr. Olender, I think I would like to show you some things. Now, Mr. Olender, I show you an application dated January 10, 1944, signed with your signature, apparently 1026 Broadway, and ask you whether you purchased the

cashier's check in the Bank of America National Trust Association, main branch, which I now show you photostat copies of, together with the applications.

“ ‘A. I have no record of those whatsoever.

“ ‘Q. It is your signature, isn't it? You will note, Mr. Olender, that they were purchased for cash, and here I show you again this application—here—“cash”—Olender, 1026 Broadway. Cash—see 73962; this is 73962.

“ ‘Mr. Metlar: Application numbers.

“ ‘A. I have no record of them whatsoever, [1398] nor do I remember them. That 6750 is one Mr. Goodman asked me about, and I have no record of it.’

“ ‘Mr. Shelton: Did you give those answers to those questions? A. I believe I did.

“ ‘Q. Mr. Olender, I will ask you if you were also asked the following questions and gave the following answers:

“ ‘Q. Now, Mr. Olender, have you any explanation whatever to make?

“ ‘A. A single transaction with Mr. Goodman for \$1,380 and the single transaction with Seagoing evidenced by the invoice No. 9662 constitute the only completed transactions I have record of. If there were any other transactions, they were never complete. When I say “completed” they were such as the check I showed you for \$27,000, check for \$50,000, which were returned to me.

“ ‘Q. The checks which I have shown you were apparently all paid into the account of Mr. Goodman, or the Seagoing Uniform Company. I’ll show it to you, Seagoing Uniform, Seagoing Uniform, George Goodman, [1399] Seagoing Uniform, Seagoing Uniform, Seagoing Uniform, Lafayette Bank, Seagoing Uniform. Same thing here.

“ ‘A. I have no recollection of having paid those checks or purchased them, or of having received merchandise for them. If I got merchandise, I didn’t keep it.’

“ ‘Were you asked those questions and did you give those answers? A. I believe I was.

“ ‘Q. I will ask you if you were asked the further questions and gave the further answers:

“ ‘Q. The transactions which you speak of appeared in your bank account in the Bank of America. They were withdrawals, withdrawn on that account. Did you ever draw any checks covering these sums?

“ ‘A. I have no recollection now. I would have to check my books; during the early years I had many cashier’s checks drawn—many of them. They are on my records, as far as I know, because in those days I had no credit and had to send the checks in advance.

“ ‘Q. 1944? A. In 1944. [1400]

“ ‘Q. This is 1944 we are speaking of?

“ ‘A. I sent many cashier’s checks in those days.’ ”

Now this is Mr. Shelton:

“Q. Mr. Olender, I will ask you if it isn't true that about a week before you gave this sworn statement from which I have read Mr. Medbury Blanchard came to your store in Oakland?

“A. I wouldn't know when he came. He came there before that affidavit.

“Q. He came there shortly before you gave this sworn statement, did he not?

“A. I wouldn't know how much before, but he came there before.

“Q. Was it rather shortly before?

“A. I wouldn't know that.

“Q. I will ask you whether or not at the time that Mr. Blanchard came to your store he did not tell you that he was investigating transactions of George Goodman? A. I believe he did.”

Now, ladies and gentlemen, the defendant has presented to you by himself through his witnesses an elaborate detailed story as to the nature of the George Goodman transaction. But in 1948 he told Mr. Blanchard that he had no recollection [1401] of those transactions other than the one which was on his books, the one for \$1,380.

That's not all. Secondly, Mr. Root, you will recall, spent some time in the Army and Navy Store, and while he was working there he had a conversation with Mr. Olender. That was early in 1948. He had a conversation with Mr. Olender and again Mr. Olender stated to him that he had no recollection of the George Goodman transactions other than the one which was on his books.

Thirdly, Mr. Ringo, who was employed by the defendant for the purposes of constructing the comparative net worth statements submitted to the government by the taxpayer, was himself unable to discover the details of the Goodman transaction. On page 72 of the transcript Mr. Ringo testified:

“Q. (By Mr. Drewes): What did you ask Mr. Olender about the Goodman transactions and what did he reply?”

“A. Well, I asked him if he bought these goods from Goodman and what was done with the goods, and they—we never were really able to get the whole story on it. The Goodman transactions weren’t entered into the books, as far as we could find.”

So Mr. Ringo himself, the defendant’s own accountant, was never able to solve the Goodman transactions. Yet you have presented to you in September of 1952 a detailed, painstaking [1402] explanation of the entire transaction, if you believe it.

Fortunately, the defendant testified that the Goodman suits—that he had Goodman suits in inventory on December 31, 1944, and yet he frankly admitted that he had not included them in his federal or state income tax returns. That we have already discussed.

Fifthly, you may recall that during the course of the trial, during the course of the explanation of the Goodman transactions, it became apparent, and under the circumstances appeared to me for the first time that 322 suits which were shown in the inventory as of 1945 and allegedly were Goodman suits,

were at the wrong price. They were supposed to be \$25 and here they were in the inventory at \$24.50. I believe the Court raised the question as to that discrepancy. One of the defendant's counsel had an answer. Let me read it to you. Page 404:

“Mr. Hagerty: I believe just before we recessed, your Honor brought up something about the difference in the inventory item of \$7,899 as against the other item of \$8,550 shown on the chart. That error is accounted for by a mistake in pricing on the inventory sheets that reduced the price 50 cents and there is also 20 suits out of the item.”

There was a mistake of 50 cents. Mr. Olender reaffirmed that point at page 580 of the [1403] transcript:

“Q. The purchases from Goodman were priced at \$25? A. That's correct.

“Q. You testified that \$24.50 in the record is an error? A. Yes, sir.”

Now much later in the trial Mr. Hellman testifies as follows—at page 1014 of the record:

“Q. And the balance of 342 suits were subsequently alleged to have been taken into inventory at cost, is that correct?

“A. 322 of the 342 were taken into inventory at cost. No, they were not taken in at cost. They were taken in at cost or market.”

There is an error here; it says “cost for marketing.” It should be “cost or market.”

“They were taken in at cost or market. They
December 31, 1945.

“Q. How do you know that, Mr. Hellman?

“A. The inventory sheet shows 322 suits at \$24.50 and Mr. Olender testified that those were the suits in question.

“Q. Do the inventories to which you refer show the figures of \$24.50 as the cost or market?

“A. The figure itself as it sits there, [1404] it doesn't say that, but there are other suits on the same inventory at \$24.50, and the current purchases around that period indicate that is the current market value, \$24.50.”

Now, that is a principle of accounting with which some of you may be familiar. A conservative pricing of inventories, inventories are usually priced at their cost or at the prevailing market, whichever is the lower. That is the point Mr. Hellman is making. So we find in the record a statement by counsel that the \$24.50 price was a mistake. We find that reaffirmed by the defendant himself, and later in the trial we get what apparently the defense considered to be a more plausible explanation. It now is the cost or market, whichever is the lower. I think that is a good illustration of a showing up of the defense of putting the pieces together, to say, to put it that way, as we go along.

Six, the defendant did not include in the sworn statement which he submitted to the government Mrs. Betty Olender's bank account, and to that extent his net worth was understated. Mrs. Betty Olender's bank account appears in the stipulation at page 2 and shows a balance of \$5,000 as of the end of 1945 and \$10,070.06 as of the end of 1946.

Seven, the defendant made two investments in the Asturias Company. He only told Mr. Ringo about one of them. The second one he left off. Now the defendant's answer to that, [1405] anticipating to that extent, will probably be that he thought the Asturias stock was worthless. Certainly, ladies and gentlemen, if one \$5,000 investment in Asturias was worthless, then the second Asturias investment of \$5,000 was equally worthless.

Eight, Mr. Olender testified that he received gifts of \$5,000 a year which were put in the vault in Fresno by his father each year between the years 1930 and 1940, and he testified that the gifts were made to himself and his wife jointly. Mrs. Olender's affidavit, which is included in the official records of the Fresno County Department of Public Welfare, executed in May of 1939, which I read to you yesterday, establishes that as of that date she had practically nothing except a small monthly income of \$150 a month.

Nine, we just covered this point. Mr. Olender testified that he received \$2,500 from Mrs. Foote for a special purpose. He received it in 1945. The \$2,500 that he received in 1945 and put in his vault is not shown on Schedule 4, and, moreover, the records of the Fresno County Department of Public Welfare establish conclusively that Mrs. Foote never had \$2,500.

Ten, Mr. Olender testified that he received the Asturias stock against his will. Let me read that to you. It will just take a second. The defendant is testifying in response to questions asked of him

by Mr. Hagerty, and they are talking about the Asturias stock. Page 367: [1406]

“Q. Was it subsequently converted into an investment in the securities of that concern?

“A. I wouldn’t know. I didn’t get the stock until 1948.

“Q. Well, was it by and with your permission that this loan that you made to them was converted into an investment in their capital?

“A. It wasn’t with my permission, no.”

Now you remember he testified that he made a loan, that it was converted later, that he later got shares, and in exchange of that loan, and you will remember Mr. Horne who testified very early in the trial and stated that cash contributions made to corporations before the corporation commissioner authorizes the issuance of stock may be carried on the books as loans payable and later when the corporation commissioner’s permission is received to issue stock, they then issue the stock and adjust it, make an entry on the books reducing the loans payable and increasing capital stock issue, and that is what happened in this case.

As I have just read to you, the defendant testified that the stock which—that the conversion of the investment by way of the loan into capital stock was not with his permission. What does the record show? There is in evidence as U. S. Exhibit No. 17 the minutes of the Asturias Corporation. This is a meeting that was held on the 17th of February, 1947, and I [1407] read:

“On motion by Director Yabroff, seconded by

Milton H. Olender, the following resolution was unanimously adopted.

“Be it resolved the secretary of this corporation be, and he is hereby authorized to make application to the Commissioner of Corporations for the issuance of 3,000 shares of the capital stock of this corporation as follows:

“1,500 shares for cash to the following named persons:

“600 shares to Mildred Lane, 500 shares to Milton H. Olender, 400 shares to Roy Munson.”

And so on.

And so whereas the defendant testified on this trial that the loan was made, that the one which he made to the corporation was converted into shares without his permission, we find that he was the very person who seconded the motion made that that be done, as was just read.

I wonder if we might take a short recess, your Honor.

The Court: Take the morning recess, ladies and gentlemen. The same admonition to you.

(Short recess.)

Mr. Drewes: Now, ladies and gentlemen, the eleventh particular in which the defendant has contradicted himself. [1408] You will recall, I am sure, that I asked Mr. Olender in connection with the Barney transaction—there are in evidence the two checks, the two cashier’s checks with which the defendant paid for the Barney purchases—and I asked him if he knew from what source the money

had come for the purchase of those checks, and he said that he didn't. You will find the Barney transactions on your schedule 4. I believe they appear as deductions from—as a withdrawal from cash. The last withdrawal in 1944. And in response to questions asked of him later on in the trial by Mr. Shelton he said that it came from the vault and he was then confronted with his earlier testimony. Let me read from the record at page 833. Mr. Shelton is asking questions:

“Q. Is it your testimony that the cash to purchase those cashier's checks did or did not come out of your safe deposit box?

“A. To the best of my knowledge they came out of the safe deposit box.

“Q. Now, Mr. Olender, I will invite your attention to pages 619 and 620 of the transcript to the following testimony when you were on the stand:”

Question by me:

“ ‘Q. (By Mr. Drewes): With respect to these two checks which are defendant's Exhibit Z, one of them marked \$2,484.26, dated December, 1944, and one [1409] in the amount of \$1,911.77, dated November the 9th, 1944, Mr. Olender, is it your testimony that you purchased these at the bank? A. Yes, sir.

“ ‘Q. And how did you pay for them?

“ ‘A. With cash.

“ ‘Q. And from what sources did the cash come?

“ ‘A. I don't remember now, Mr. Drewes.

“ ‘Q. Do you have any record which would indicate the source? A. No.

“ ‘Q. The source of cash?

“ ‘A. I haven’t.

“ ‘Q. It was stated by your counsel in response to a question asked of him by the Court that this particular transaction was discovered by your accountants after the stipulation was entered into, is that correct?

“ ‘A. I believe so. I didn’t work with the accountants. They did all of the work.

“ ‘Q. You recall when?

“ ‘A. Oh, this last week—probably Sunday or Monday. Just the last few days.

“ ‘Q. Did your account ask from what source this cash came? [1410]

“ ‘A. I don’t remember.’ ”

So earlier in the trial he had no recollection from what source the cash came and he didn’t even remember whether or not his accountants had questioned him about it. He had no recollection of the Barney transaction at all as to the source of the cash, and lo and behold, it appears from the safe deposit vault and he later testified it came out of the safe deposit box.

No. 12. Mr. Olender testified that he had never done any auditing work. Let me read the record at page 425:

“ ‘Q. And you have testified, Mr. Olender, to a business concern owned by your uncle and your father which was operated by them in Fresno for a couple of years? A. Yes, sir.

“Q. Did you do any auditing work for that firm? A. No.

“Q. You worked for that firm, as you have testified, following your graduation?

“A. For a very short period.

“Q. Did you not ever do any auditing work?

“A. No, sir, not to my knowledge.

“Q. Did you do auditing work for a firm in which your mother had an interest?

“A. A firm that my mother had an interest in? [1411]

“Q. Or a business undertaking?

“A. Not auditing, no, sir. I never did any auditing in my life for anyone.”

The government then asked Mr. Olender if he had not executed an affidavit filed with the Bureau of Internal Revenue in connection with his probate of his father's estate and he said he had, and he was asked whether or not the affidavit, which is government's exhibit No. 67, did not include this statement:

“That in 1918 he was graduated from the University of California as an accountant and that he thereafter moved to Fresno and worked for his parents in the stores that they and his uncle, Samuel Olender, operated at 1520 and 1933 Tulare Street until about 1922. That as he was a trained accountant, from about 1918 thereafter he audited the books of said business, and he said that his affidavit did indeed contain those sworn facts.”

What was his answer to Mr. Hagerty's question:

“I didn’t read it. My sister prepared it and I didn’t read it.”

Thirteen. The defendant did not include on his return the profit enjoyed by him of something over \$2,000 as a capital gain on the sale of the Riverdale Ranch although in that year he did report and take in full a loss on the sale [1412] of what is called the Wilson Avenue property. His explanation, you will recall, that he did not understand the basis or he did not understand how to determine the cost basis of the Riverdale Ranch. He would have you believe that. But the record also shows by his own testimony that his primary work in connection with his father’s estate and the inheritance tax or estate tax return that was submitted in connection therewith had to do with the evaluation of real property included in the estate, of which the Riverdale Ranch was one. By his own testimony that is all he did in connection with his father’s estate, that he didn’t prepare the return, didn’t do anything else. But he did hold numerous conferences, the purpose of which was to determine the value of the real property of his father’s estate. The Riverdale Ranch is included in that estate tax return and the valuation subsequently put upon it of course appears in the return. The taxpayer need only subtract from his share of the proceeds received from the sale of the ranch his portion of the value as shown on the estate tax return.

As I stated a moment ago, I will repeat again, and I am sure the judge will instruct you, that if you believe that the defendant has testified falsely

in any material regard you may consider all of his testimony as false. I submit to you on this record, ladies and gentlemen, there is no other possible conclusion. [1413]

Now the defense has sought to establish quite apparently throughout the trial that this defendant knows very little about accounting matters. Many of these things undoubtedly will be explained in terms of ignorance on the part of the defendant, that he just didn't know what he should have done. Do you believe that, really? The record shows that he graduated from the University of California with honors, that he took accounting courses there, including an upper division course in accounting. His honor thesis was on something having to do with refunding bond interest on railroads, and I can think of few things more complicated or intricate. The record shows by his own testimony that he prepared his own tax returns. He prepared the returns for his wife, he prepared returns for his mother, he prepared returns for employees, he prepared returns for the Simmons. Let me just hold up for you, for your quick inspection, two of his returns prepared by him. Look at the painstaking detailed work on that return. Look how it is prepared. Look at the work on this return. Does that look like the work of a man that doesn't know what he is doing, who doesn't fully understand the intricacies, the ins and outs of the preparation of tax returns? That is a beautiful job. I wish mine looked like it. Is that man a man who is the victim of his own ignorance? Has he fumbled his way

into a bad situation? Or is he a clever man indeed who has known precisely what he has done [1414] every step of the way?

This man, the record shows, has carried on a great number of transactions entirely in cash. Schedule 4, unexplained withdrawals from the box. He would have you believe they total \$92,000. By his own testimony he never carries less than a thousand dollars, or, rather, didn't at that time, in cash in his pocket. Look at his personal bank account. This is the personal bank account. This happens to be January, 1944. There are three items. Take it at random: September '44, three items; March '45, three items. This is his personal bank account from which he pays his own bills, presumably. Here is October '45. What does your bank account look like when you get it at the end of the month? I don't enjoy a fraction of this man's income but I could fill a page. But this man has no charge accounts. Why? What's the purpose? To leave no record. There is no other answer. You and I, average citizens, don't conduct our affairs in this way. We don't go out of our way, which I am convinced the record shows this defendant did, to leave no trace behind him—even to the extent of his own personal monthly recurring obligations. Not only his transactions in sailor suits but his grocery bill—cash—no records. Are those the actions of a man who is forthright, whose life and personal conduct, personal transactions that he engages in from day to day, can stand the light of day? Or are they devious and hidden, [1415] purposely confused so

that no one can find out what he did or what happened?

The law requires, as His Honor will instruct you, that all taxpayers keep whatever records are necessary to determine their gross income, and if they are business men, including inventories and deductions to which they are entitled in order that tax may be assessed. This man did not do it. Why? What was his purpose? It may be that he didn't keep records for the purpose of hiding some other transactions which were in themselves wrong.

His Honor will instruct you that if you find that he had substantial unreported income for which there were no records and that he did so knowingly for the purpose of evading taxes, then the offense is committed, even though his purpose may also have been to cover up other wrongful acts.

Now it is a law, and rightfully so, and the judge will instruct you, that you must to convict find that the defendant is guilty beyond a reasonable doubt. That has always been English law and American law in criminal cases. As I say, rightfully so. But a reasonable doubt, as His Honor will instruct you, means just that. It is a doubt based on reason. It is not just a mere speculation or a conclusion: well, it may have been so, or a hunch. It is what it says. It is a doubt based on reason. It is the kind of a doubt, it is often said, that might arise in your own mind in deciding or determining [1416] some problem of your own, whether to buy a house or sell one, or send your child to this school or another,

or go on a vacation to this place rather than staying home and buying a refrigerator. It is a substantial reasonable doubt.

Now I submit to you, ladies and gentlemen, that if there is any doubt whatsoever as to the defendant's guilt in this particular case, it is not and cannot be a doubt which is based on reason, which has any relationship to reason, because the entire defense lacks logic. The entire defense—let me qualify that. I don't want to overreach. The greater part of the defense is based solely on the unsupported testimony of Mr. Olender.

The government's case, to the contrary, is supported by substantial evidence, in the form of documents, affidavits, bank records and the like.

I submit to you, ladies and gentlemen, that the defense in this case is a sham. It is so intricate it requires so many wild assumptions that it falls of its own weight. It is not worthy of belief. Ladies and gentlemen, you must convict. [1417]

* * *

October 10, 1952, 10:00 A.M.

The Clerk: United States vs. Olender on trial.

Mr. Hagerty: If your Honor please, by agreement with Government counsel we are going to try to limit our arguments. In other words, I am going to try to close within an hour or thereabouts. The Government will follow, with slightly less time than that.

The Court: I am not going to charge the jury late in the day, if that is your intention.

Mr. Hagerty: That is what I am asking. Would you charge the jury at two o'clock when they return after lunch?

The Court: It means they go out about three o'clock, late in the afternoon. You gentlemen told me yesterday you would consume the day in argument. I had planned to charge the jury Monday at 9:30.

Mr. Hagerty: It was our hope to get the case finished today.

The Court: Counsel, I am not going to send this jury out late in the day after four weeks of trial, unless the jury desires to come here Saturday morning, and it isn't my intention to bring them here Saturday morning.

Let us see how the day progresses.

Mr. Hagerty: I wouldn't want to limit my argument.

The Court: Counsel, I indicated to both you and Government [1473] counsel that there would be no limit on the arguments, that I consider the arguments helpful. They have been helpful to me. I am sure they have been helpful to the jury. I am not going to rush the case at this late stage. If it is early in the day and you want to close your argument early, that is a matter of your province. But I don't think either side should rush this case. It isn't fair to the jury, it isn't fair to the Court, after four weeks of trial, to rush into an afternoon, charge the jury abruptly late in the afternoon, send them out. It isn't fair. I have had too many jury

trials and I know the temperament of juries, as you do.

Mr. Hagerty: May I speak to counsel?

The Court: Certainly. If you conclude the arguments at noon time, I will charge the jury at one o'clock.

Mr. Hagerty: I think we could do that, your Honor.

The Court: All right.

Mr. Hagerty: Last evening as we were closing, ladies and gentlemen, I mentioned about the stipulation that had been entered into with and by Government counsel and ourselves in reference to the affidavit of Judge Monroe Friedman. That stipulation was entered into as a result of a phone call which was handled between Mr. Lewis and Mr. Drewes. I gathered from the stenographer in the office as to certain aspects of it. I knew that we had the judge under subpoena and of course I knew that this affidavit was not considered in the [1474] stipulation as to assets. It was worked out by Mr. Mytinger and Mr. Whiteside. So I assumed, of course, that the call was from Mr. Drewes asking us to stipulate and not call the judge. I understand that is not quite the fact. Mr. Drewes will explain it to you when he gets up.

I want to be fair in everything, fair in everything connected with this case. I want to deal only with what is on the record, on the record, and we have the affidavit entered into by stipulation. We did have the judge under subpoena. Ordinarily it is not necessary to subpoena a man of that type be-

cause each one will accept to his word. So that is what was ultimately entered into. His affidavit was admitted, as that would have been his testimony if he took the stand.

Yesterday I was explaining to you in connection with the testimony of Mr. Whiteside, some of the cross-examination of him by Mr. Lewis, where this transaction had come up, where the funds from the sale of suits from Leavy to Lerman resulted in \$5,000 that came back to Mr. Olender, which he then put into his firm. The criticism was made of his accounting methods as crediting that not to sales but to his investment account as new capital again put into the business. Great criticism was leveled at him by the Government because of that. But at page 206, at line 9, Mr. Lewis asked Mr. Whiteside this question:

“Q. But if it was not in the inventory and never [1475] put into the inventory previous to this time, and was sold and put in the store account, wouldn't it go into the investment account?

“A. Well, if he is reinvesting money, it would go to the investment account, yes, sir.”

Great to-do has been made about the tremendous accounting ability of the defendant in the preparation of his own accounts and his income tax returns for himself and others. I show you the Government's Exhibits 5 and 6, which are the individual returns for the defendant for the year 1942—for himself and his wife, but he gives reference on the return, which is in evidence—you can see—“See the Navy Store return.” “See the Navy Store return.”

Well, if he is a sole proprietorship, he doesn't have to make out a return for the store. But he did make out a return for the store. He made out one for himself and another one, practically a duplicate, in his return for his store. Well, that is unnecessary. One familiar at all with income tax procedure knows it is unnecessary.

But in bringing you the returns in evidence, did they bring you both of them? No. They brought you only his individual return, on which he says, "See Army & Navy Store return." So this is actually an incomplete record. The Army & Navy return submitted in connection with this, should be attached to this or brought in as a schedule. And when the [1476] agent was brought here from the Government, he made some reference to the other return, but he didn't bring it.

Right there, ladies and gentlemen, punctures the great bubble that has been expanded into this man's knowledge of income tax and accounting procedure.

That is an eloquent example. And you may examine these in the jury room.

Now we have heard a great deal here about lost records. You will find, as I refer to some more of Mr. Whiteside's testimony, that he found the records in pretty good condition. So did Mr. Root. So did Mr. Ringo. But over this long period of time—we are addressing our attention now to the years '45 and '46—over this long period of time isn't it reasonable, isn't it to be expected that records would be lost? It's just a natural thing. A lot of records would be destroyed. And as a very good

example, I. Magnin & Company did not have their records for the period under inquiry; the Security National Bank, a banking institution, didn't have their records in connection with certain of these transactions that they brought into evidence; Money Back Smith Company didn't have their records that far back. Is it strange to find that a man who operates a store, which is a small store compared to any of the institutions I have mentioned, wouldn't have his records? Why, it's the most natural thing in the world. In addition to that, the witness Carroll—you [1477] remember the man who keeps records for the Bank of America, who came in two or three times—he didn't have some records that were requested. You recall that when he came here. He couldn't find certain records. Banking institutions, generally, above all places, watch their records and keep them.

Now you have been told time and time again that this is pure fabrication, this defense is fabrication, that Mr. Olender is not to be believed. Let's see what some of the men say about him who know him. Let's take a look at Volume 6, at page 282—start on page 281. Mr. Reinhard, the head of the Bank of America in Oakland, was on the stand, and on examination he was asked this question:

“Are you acquainted with the defendant Milton Olender? A. Yes.

“Q. About how long have you known him?

“A. Oh, for approximately 20 years.

“Q. Are you familiar with his reputation in the community over there?

“A. I believe I am, yes.

“Q. What would you say his reputation in the community for truth, honesty and integrity is?

“A. Well, in my opinion, good.”

Then there were objections. Further down the line, page 282, line 12: [1478]

“Q. His reputation is good, you say?

“A. In my opinion, very good, sir.”

Here is a man that has known him for twenty years, who has dealt with him in business all that time, makes loans to him in large amounts. What is his reputation? He trusts him. He would certainly trust him anywhere; his reputation is very good.

What does Mr. Lorenzen say about him? He has known him for many years, he is a man in business over there. Mr. Lorenzen in the same volume, at page 319, line 3:

“Q. Are you acquainted with the defendant, Milton Olender? A. I am.

“Q. How long have you known him?

“A. About twenty-five years.

“Q. Have you had occasion to do business with Mr. Olender? A. Yes, I have.

“Q. What would you say his reputation in that community over there for truth, honesty and integrity?

“A. I think it is the best.”

Now here are men with whom he has been dealing over a period of many, many years. These are

people with whom the Government investigators talked, checked and dealt with at some length of time. Yet they come in and tell you that this [1479] man is not worthy of belief. So by inference they are telling you that these men aren't either. And we know that gets to the ridiculous stage.

Now the Government has questioned the cash transactions the defendant had with the Money Back Smith store, because, you see, with those cash transactions, those goods being paid for in cash, as testified to by the defendant and by his bookkeeper who later made the correction after the end of the year to credit him for purchases made and reduce his liabilities, with the net result that his net worth at the beginning of the period would have been increased for the amount of those purchases, the Government questions it. But what did Mr. Lorenzen say at page 320 of the same volume:

“Q. And Mr. Olender bought these goods from you, did he? A. He did.

“Q. Do you know the method of payment for these goods?

“A. Well, he paid in cash most of the time for them.”

Now this is going back a long period of time. He is being questioned here about a transaction at least six years ago. The government had the opportunity to investigate these men, ask them these questions, but still they say: No, we won't believe you, we won't believe you. Those are men of [1480] standing in the community over there. Why is the Government jumping on this man, why, after this

number of years, and they have had this man under investigation since 1947—that is the inception of this thing, stemming out of the Goodman investigation—why haven't they brought this case to trial long since, when records were available, when Goodman was well, when they could have produced a case in court—maybe, if they had one? The reason? Why, it is because they never felt that they had a case against this man, but in the past year or so a lot of officials—maybe not a lot—we hear a lot more than actually existed—in the Bureau of Internal Revenue have been tagged off base, some of them resulting in criminal indictments and some of them being sentenced. Immediately word went out: Prosecute every file we have got in the house. And that's what this is.

Mr. Drewes, Mr. Whiteside, Mr. Root, they are not men—I don't think they are men who would knowingly fight to convict an innocent man. Of course when you are working in a field like that, you come to have a fixation of mind. It's pretty easy for you to believe, when you are doing it all the time, nothing else but prosecuting a man or chasing a man down, to think, well, there is something there even if I can't find it, he is guilty even if I can't find it. It gets to be a mental fixation. It's pretty easy for them to think and fall in the pathway of their life's thought. But still [1481] I don't think they would prosecute a man if they really felt he was innocent. But, as I say, it is easy for them to feel that a man is guilty, because that's their business, that's their business, and say: Well,

maybe I don't quite see it, but I know he must be guilty.

Well, that isn't evidence for a court. Suspicion isn't evidence in a court and suspicion can't support a verdict. There has to be evidence brought to you in the form of documents or word of mouth here under oath in this court.

But when the axe fell in Washington and chopped off some big tails, immediately the order went out and these fellows don't have the discretionary power to stop this thing. If Mr. Drewes would rise up in this court and say, "Well, after all, this evidence is in, so what, I don't think I have got a case, and I will join the defense counsel in a motion for dismissal." The newspapers would seize him and tar and feather him in every headline in the country, and say, "Whitewash an income tax case." They can't do it. If he sends a memorandum to the Attorney General's office that this case should be dropped, they will say: It's too hot for us to handle. Let the people handle it. Once the wheel starts turning, you are just in the machine, that's all, and the only way to stop it, ladies and gentlemen, the only way to stop it, is for a group of citizens, like you, to just put your foot down. When a case comes up like this, with a man that they don't have any [1482] evidence on, or the evidence they have produced is very equivocal, shot through with doubt, come to a speedy verdict of acquittal.

You can see there is doubt all through this thing, doubts everywhere you look. This man is not charged, as so many of these cases you have read

about in the headlines, he is not charged with bribing an official to backdate an income tax return. He is not charged with that. He is not charged with bribing an official to fraudulently cut down his tax. Nothing like that. They simply say he did not state all his income, and they start out with the wrong premise. They do not give him credit for the actual wealth he had at the inception of the period. If you start out with the wrong reasoning, you can never get a correct result.

It is a trick formula, but you will always be wrong. They haven't given him credit for the money in the Goodman purchase, of which they have produced in evidence the checks with the dates as to when the checks were bought. There's \$20,000 right there. They haven't given him credit for that. They haven't given him credit for these purchases that were made in cash and were incorrectly charged to his accounts payable, which would increase his liabilities for the period. That's the Barney and the Smith transactions. They didn't give him credit for the \$1,000 check he had in his pocket which had not been cashed. They didn't give him credit [1483] for the gifts he had received. But at the end of the year, for a transaction just about as big as the Goodman transaction, the \$20,000 worth of bonds of his mother, they charge him with it, they say that he bought those during the period when they knew he didn't. They investigated that. They talked to the mother, and if her lips weren't sealed in the grave and she could come here, you would hear the story. But we can't intro-

duce her letters—the rules of exclusion of our laws of evidence—we can't introduce her letters.

You recall when the men were on the stand, the men from the bank, and Mr. Whiteside, and we said: You investigated this case, you knew her signature. Can you identify her handwriting? But they couldn't identify her handwriting. Mr. Whiteside said—he may have seen a lot of it, I don't know—but he said, "Well, I only saw her signature card at the bank." But he talked with her. He spent two evenings talking to her. He discussed her affairs. Don't you think he asked her about those bonds, don't you? The \$20,000—the Goodman transaction only exceeds it by \$500. Don't you think he talked about it, and at some length? I will get to his testimony in a minute and see what he said about it. But I think he did talk to her about it and she told him that they were her bonds, not Milton's, but she had given him the interest on the bonds which he reported on one of his returns. She had reported it the year before and subsequently, when Mr. Ringo made the [1484] following year's income tax return for the defendant, he reported it properly. Mr. Ringo did—that is, the man—the owner of the bonds, must report the interest.

So, ladies and gentlemen, I think there is doubt all the way through this thing. It just doesn't stand up to the acid test of reason and, as I explained to you, why. You know that when the scandal started in Washington, immediately these income tax trials started out in prominence, as they call it. And why? The politically smart and adept men in

Washington knew the best way to take the fire and heat off themselves was to throw it out into the field, and that is why we are here, taking the heat off Washington. Had the Government taken into consideration the Goodman transaction, the cash in box—they only gave credit for \$50,000—if they gave him credit for \$75,000, that would be another \$25,000, and then these gifts that I spoke of, and reduced his wealth at the end of the period where they have put in the mother's bonds, our figures would be in practical agreement, and, as I pointed out to you before, these net worth approaches are not exact, they are only an approximation. It's like a slide rule, it gives you a quick answer. It gives you an approximation. It is not an accurate picture. But have they given him the proper credit for the things he had and not charged him with the things that were his mother's, there would have been no dispute here. [1485]

This is without a question of doubt one of the weakest net worth cases I have ever seen, the weakest, I should say, and the answer is political.

Now, Mr. Drewes said that the defendant was false in telling you that he wasn't an auditor, and then points as proof of that that he worked and assisted his sister in his father's estate in getting the valuation reduced of the properties, the Riverdale Ranch and the other properties that were in that estate, getting them reduced, fighting with the inheritance tax appraisers as to the value of those properties. Well, again, we are back on the subject of tax avoidance. The valuation of property from

the average person's idea is the value of a thing which you pay for generally, and they had bought these properties years before at a lesser amount. So it is an argument when you go to these appraisers as to whether the weight of times and people and changes of circumstance have increased these values. Well, everybody has got a right to be heard, and he just simply had gone and talked to this inheritance tax man and kept harping that they were uprating the property too high. What in the world has that got to do—what in the world has that got to do with the interpretation of a most abstract section of the income tax law? The evaluation of properties received through inheritance and death, that section was read to you by Mr. Mytinger, out of the Code sections, the law book, at Mr. Lewis' request. [1486] It is a lengthy involved bit of internal revenue law. I don't want to take up the time reading it to you now. But I think you will recall that long section that Mr. Mytinger read, and I doubt if the average person can interpret it, let alone a lawyer. The law books are filled with cases involving it. So I think in that respect Mr. Drewes' argument and attempt at impeachment is absolutely silly. There is no comparison. The fact that he could go down and talk to a man and say: You are putting too much value on this piece of property that belongs to my father's estate, the fact that he could do that, that he ought to be able to interpret a very involved Code section, it's just nonsense, it doesn't make sense. It's just like their whole case, like starting out with the wrong figures

in a net worth case, it just doesn't make sense. It's like one of these silly syllogisms like you would say all Russians are men, all Russians are Communists. Therefore, all men are Communists. It just doesn't follow. If you start out with the wrong basis, the wrong premise, you are going to end up with the wrong answer.

Now Mr. Drewes spent several days questioning Mr. Hellman on the stand, and to each point in our schedules he would say: Did you verify this, did you verify this? Well, Mr. Hellman came into the case just shortly before trial, relatively speaking. How could he verify any of these things other than the records that were in existence? He [1487] couldn't go to the cash box. It had long since gone. The money is gone. How could he verify anything like that? He knew that. That was only window dressing for you. And when we attempted to do it to Mr. Mytinger, you remember he said: I didn't verify this—and the same thing goes for the entire record: I verified nothing.

But they can blow up these beautiful bubbles or these involved statistical treatises for you based upon the premise that is given to them at first, the assumption, if you assume this, then it is logic. But if you start out with a twisted basis, you can't build a straight house unless you make a lot of adjustments.

Another thing that flies right into the teeth of their argument. They say the defendant here is one of the smartest men, and this and that, he is not to be trusted, he is tricky, he is clever and

dodging and ducking, and so forth. He bought—by their own record—it is in evidence—approximately \$58,000 of United States Government bonds from the United States Treasury, of which the Bureau of Internal Revenue is a subdivision. If he was so smart with illegally obtained money, would he go right to them and buy bonds from them? Everything could be traced, identified positively as to time, point and everything else. It doesn't make sense. It doesn't make sense.

Cross-examination of Mr. Whiteside, page 1170, I believe, [1488] referring to the examination of the invoices that was made on the day we didn't come to court, that morning by Mr. Hellman, Mr. Root and Mr. Whiteside, here in this court, the question was asked Mr. Whiteside:

“Q. Didn't you state at that time that inasmuch as 1944 was proved correct it was deemed unnecessary to verify 1945 and 1946?”

“A. That was one of the factors considered. The main factor, I would say, was the time of day. It would have taken several more hours to check those out.”

Now, do you think an experienced investigator is going to let a matter of a few hours (we have been at trial a month) on a day that we were off, like that, hold him up if he thought he had some evidence that he could really produce in this Court? Why, of course not. He found the records all right. So he decided a search was fruitless, useless, so he did not continue it for 1945 and 1946. The records

were proper for 1944, so he knew he couldn't start anything.

On page 1233 of Volume 16—I told you that Mr. Carroll testified that he couldn't find certain records—line 12, page 1233:

“Q. Will you state whether or not you were able to locate an application for that cashier's check?”

You remember the first cashier's checks they were asking [1489] about, the applications made by the defendant for them.

“A. I was not successful.”

The Bank of America couldn't find that record.

The lost records of the Security Bank, page 987, Mr. Gahura, the man from Fresno—989, I guess it is—in reference to a \$2,500 withdrawal from that Fresno bank. Mr. Drewes is examining Mr. Gahura. He says:

“Q. Can you state what the ultimate disposition of that sum of \$2,500 was? A. No, I cannot.

“Q. And why can't you?

“A. The records were mislaid or lost. We are unable to find them.”

Mr. Whiteside's testimony, page 1179. The question was asked him:

“Q. Didn't Mrs. Olender tell you during the course of your investigation that \$20,000 worth of bonds belonged to her?

“A. I don't believe we asked her that question. I don't recall.”

Now, ladies and gentlemen, there is a transaction that is nearly the same size as the Goodman suit

transaction. \$20,000. The chief investigator on this case makes a special trip with an assistant to Fresno to see this woman and to check her record and doesn't recall asking her about the [1490] second biggest single transaction in this entire case. Is that reasonable? Of course it isn't. And if he had asked her, don't you think he would have remembered? Why, sure he would. But he says, "I don't recall."

"Q. You did not ask her that question. That is one of the largest items in this case.

"A. I don't recall that particular point, Mr. Lewis."

It burns you up sometimes. Now we are the side that is charged with fabrication. Don't you know that if that woman had said, "Yes, those are Milt's bonds. He has had them for years. I gave him the money a long time ago. But he has had them for years. But he made the money this year and bought them at my suggestion." Don't you know that his mind would have been crystal clear on that subject? There would have been the point he wanted.

There is a rule of law, I am sure His Honor will give it to you, that in regarding evidence you are not only to consider it for its own intrinsic worth but as to the type and quality of evidence that was within the party to produce, and when secondary and less value or weaker evidence is produced, when stronger might have been produced, you are entitled to distrust it entirely.

Now don't you know in his mind, if he were really working on this case, and I think he was,

don't you think his mind [1491] would be crystal clear on that transaction? Why, of course it would. And don't you know that after his interview with Mrs. Olender he must have gone back and followed his usual custom of sitting down and writing out his notes, because he knew the day would come when he would have to testify under oath on the witness stand as to what occurred at that interview.

He is here to win a case, not to lose one, and he is on that team. Not ours. So he will not be patted on the back for putting anything into evidence that will aid us.

But here we are, ladies and gentlemen, for the furtherance of justice. We are here for the perpetuation of the American idea of liberty, which concerns us all, each and every one of us, and I am sure that you will feel the same way as I do about a statement like that.

Mr. Lewis says: "You can't remember asking her that question? Here, according to your own figures, you come out with \$73,000 of unreported—what you claimed to be unreported income, and during the course of your investigation you didn't ask Mrs. Olender about the \$20,000 worth of bonds?"

"A. I say we may have asked her. I don't recall at this time."

Is there any doubt about it in his mind about similar events at or about the same period of time involving much less, [1492] much lesser details, things of much lesser significance? Not at all. He is sharp. He can tell you the very day he started on this case and what he did.

Now we ask him another question:

“Q. Have you examined all the records in the bank concerning Mrs. Olender? Didn't you?”

“A. Yes, sir.

“Q. Are you able to identify her handwriting?”

“A. No, sir, not just from a signature card. That would be the only handwriting in the bank.”

Then on page 1181:

“Q. (By Mr. Lewis): Did you or did you not talk to Mrs. Mollie Olender about those \$20,000 bonds?”

“A. Well, my answer that I gave you a few minutes ago, I stated I did not recall talking to her about those particular bonds. I may have. We talked to her two evenings and we covered many subjects.”

It's the most important subject he could have covered, the biggest single item.

I will let you evaluate that, ladies and gentlemen. You remember a little girl, Mrs. Manger, the bookkeeper from the defendant's establishment. She used to be his employee. She formerly had been the employee of Dorfman and a part-time employee of the defendant. Do you recall she [1493] had never been even questioned by the Government before? The first time they ever interviewed her apparently, other than when Mr. Root saw her in his first investigation in the office—but he didn't question her in reference to any of the books—but the first time they ever had seen her was when she took the stand here. Don't you think that if you are going to investigate a man's business on a net worth basis

and you were finding great criticism in your own mind with his bookkeeping system that you would have gone to see his bookkeeper? She was the lady that made the entries covering the Money Back Smith transaction and the Barney transaction, and she explained it to you from the stand. She said that she—she gave you her routine of the operation, how she would write the checks for the invoices that were made up, and when she had these checks to go out for these transactions Mr. Olender told her that he forgot to tell her that he paid cash for these items, and she made a journal entry in the books to change it and credit her account and charge off the accounts payable. Do you recall that? That's in the record here. I won't take the time now to read that to you because we are fighting time. I would like to see that you are able to finish this case today. But that's the evidence here. And don't you think, isn't it a reasonable assumption to make that if you are going to question a man's business, if you are questioning him on a net worth basis like this that [1494] you would proceed to inquire of the people who knew the most about that business, what they had done in connection with some of these entries? It's perfectly logical. But they never did.

And the other lady, Miss Busby, who took over the books after Mrs. Manger. She saw the investigators only once. But that's not permitted into the record here because it wasn't to do with the investigation here. So it was inadmissible. So I can't tell you about that.

I told you about the lost records of I. Magnin. Mr. Cahn, the credit manager, appeared here in answer to a subpoena by Mr. Drewes. Mr. Drewes questioned him on page 43 of Volume 2, line 16.

“Q. Mr. Cahn, you have appeared here in response to a subpoena duces tecum. You were asked to bring with you the records of I. Magnin & Company with respect to the accounts of Milton Olender and/or his wife, Mrs. Betty Olender, for the years 1945 and 1946. Have you brought those records with you? A. No, sir.

“Q. Why not?

“A. We don't have them any longer.”

You know, if you and I were injured in a bus crash or something like that, if we didn't file suit for our injuries [1495] within a year we would be out. There are statutes of limitations, and the policy of the law is that stale quarrels shall not be encouraged; bring your case to court when we can have all the people who know about it and all the records are available. The Government didn't do it here. And they had the opportunity.

We heard a great deal of accounting practices here and criticism has been levelled at the defendant in reference to his pricing of the Goodman suits when they were taken into the inventory, which you will find on these sheets, and he is criticized for putting them on the sheets for \$24.50 instead of \$25. Undoubtedly that was an accounting principle based on the soundest and most conservative practices, placing those suits on the books at whichever is lower, cost or market, to more cor-

rectly explain your position and your inventory. Everybody after the war and along toward 1945 into 1946, everyone anticipated a let-down, a depression. Consequently everybody got ready for it, in smaller businesses and larger businesses alike. He is marking down his inventory to cost or market, whichever is lower.

These exhibits, you can examine in the jury room.

He was criticized for being indefinite as to where the funds came from with which he made the Money Back Smith purchases. Well, the accountant took it for granted under the man's statement that if the money didn't come from the [1496] sources he named, his business, the income from rents and gifts from the mother and such, that it came out of the box. Our accountant deducted it from the box. If the Government criticizes that on the man's testimony, it increases the money we have in the box at the end of the period on Schedule 4 at December 31.

That Money Back Smith transaction, a withdrawal of \$2,160.03, that is this figure here, if the Government wants to criticize that, we are operating on a conservative basis. We charge it out of the box. If they say it didn't come out of the box, it increases the money we have on hand and benefits us. But they don't want that to happen. They say, no, we won't give him credit for that. We will give credit for the Barney transaction, which reverses our position, which funds didn't come out of the box.

There is a method to this madness, ladies and

gentlemen, and you can follow it in their theory.

Now, as I said before, this is a circumstantial evidence case. All these net worth cases are circumstantial evidence. Circumstantial evidence, as His Honor will instruct you, is the type of evidence that in order to support a verdict in favor of the Government, counsel must not only be consistent with the theory of guilt but absolutely unexplainably inconsistent with any other reasonable theory. If there is any rational explanation in any way of it, circumstantial evidence [1497] will not stand up because there is then reasonable doubt. And I tell you, and I say it advisedly, that this is shot through with reasonable doubt.

Does your Honor want to take the recess?

The Court: I didn't notice the time. We might take a short recess, ladies and gentlemen, with the same admonition to you.

(Short recess taken.)

Mr. Hagerty: May it please the Court, ladies and gentlemen, Government counsel, and colleagues. I will try to close very rapidly.

The charge was hurled at the defendant that you couldn't see the breakdown of the Government interest on the bonds on this return or in some of the returns—this is the return for Mrs. J. Olender—you couldn't see the breakdown of the bonds on it. It is very simple, ladies and gentlemen. You can examine this thing in the jury room. You can see it marked right there.

Another thing, we have had the loss of records

discussed many times—where are they? The most interesting one to my mind is the contrast between defendant's Exhibit P, which is the partnership return for 1946 out of the Fresno property, wherein he has enclosed the schedule showing the loss on the sale of the Riverdale Ranch. Here is the schedule. I have these things clipped together so you can contrast them, because [1498] here is the Government's record. They don't have the schedule. It is not attached. But if you will look closely at this thing you will see that at one time something was stapled here. There is a staple mark right through there. Isn't it reasonable to assume that this schedule had been stapled to it and the Government has lost it? Their record is incomplete. Here is a copy of the defendant's return with his schedules attached. You will remember a great to-do was made about it at the time, it couldn't be so, couldn't be. But if you examine their own return, you will see. I think of the millions of returns they had over there, they must have lost a certain number of them, and this schedule was attached thereto. You can observe it for yourself. The staple mark is right through the center. I think they have lost it.

Great store has been set beside the pension, the old age pension that was granted to Mrs. Foote. Mrs. Foote was not any blood relative of this defendant. He has told you that his wife didn't tell him anything about any affidavit that she signed. And I can well believe that. One of the great problems of the modern family, particularly of the working people, those people in the ordinary cir-

cumstances, is taking care of disabled or elderly people. Now don't you think that because of your common observance—you are entitled to draw on your own experience in some respects so long as you use reason—Simply because you are passing behind [1499] this gate doesn't mean you are to leave outside your common sense. Your common sense will carry you through a lot of these tricky and technical attempts to blind you. Isn't it true, and you have noticed, that many a time a husband and wife, either the husband or the wife, will have a relative that needs help; and unbeknown to the other spouse help will be given. Mr. Olender said he didn't know anything about any aid—any affidavit his wife had signed. Mrs. Widrin was here on the stand. She is one of the daughters. They could have asked her if they wanted to bring that out in the first person to you. They could have asked her certain things in that connection. She was one of those who signed an affidavit. No attempt was made to. But you will note that as of the date of February 23, 1943, that the old age pension or help was discontinued, and it was at the request of her daughters Ella Widrin and Betty Olender. They told their mother that they would assume full responsibility of her in the future. Therefore she wanted her old age—assistance, I guess they call it—discontinued. Look at that in this record.

Now that is before any of the time that this man is charged with income tax evasion or by inference they attempt to smear him with this thing. This

is in 1943, early 1943. And in looking through his books, as I pointed out to you yesterday, there's many a check out of his business made to Mrs. Foote. [1500]

Now, there was another attack made on their own witness, Mr. Ringo, Mr. Ringo that they set great store in him, like the Rock of Gibraltar, on that \$50,000 indicated as the cash box proceeds in his preliminary statement. They say we must stand by that. That is the basis of their whole suit. But you see how quickly they challenge and say he isn't telling you the truth when he told you he went to the security box with Mr. Olender and examined the contents and found the mother's bonds in an envelope marked "Mother's bonds." They attack him there. But he is their witness. They vouch for his honesty and integrity—but only want the things they want—no matter what witness produces them.

Think of our witnesses. We brought in the little fellow Terrana, the tailor. He told you the situation in reference to the suits and the adjustments and the tailoring, and so forth, that Mr. Olender couldn't have a tailor, didn't have a tailor shop at the time of this inquiry, and couldn't have a tailor shop under the present restrictions of his lease. Nor could the tailor sell suits under the present restrictions of the lease. They bore out everything for us, and the ring of sincerity in this story. And you just think, Mr. Olender was on the stand for four days, and under the best cross-examiner probably in the United States Attorney's office, Mr. Drewes,

trying to dig and pick [1501] and dig at transactions that occurred up to—well, all the way back to '42. Just think, how would you react sitting on the stand, could you recall all the details of the transactions you have been through in that period of years? And just to show that none of us are infallible, I could point out to you in one of these transcripts the statement of Mr. Shelton, who has lived with this case a long time. He is the Government counsel who has brought this thing to the United States Attorney's office for prosecution. When Mr. Hellman was on the stand I asked him in connection with one of the TCR's. I said—I asked him and showed him a notation that was written on it and Mr. Shelton said: "Gee, is that on there? Is that there? Where is that in one of the exhibits?"

That was in one of his own exhibits. He didn't know that representation was on it. That is just to show—not to criticize him, but just to show the fallibility of the human memory. A moment ago when I was talking about that credit on that schedule I misstated and called it the Smith transaction instead of the Barney transaction. In my mind they both tie together because of that general entry that credited them on the books on the accounts payable, made by Mrs. Manger, the journal entry made by her to credit him for an overstatement of his liabilities.

Now, ladies and gentlemen, I am about to close here. [1502] You will soon, after Mr. Drewes finishes, have this case to consider. I think it is shot through with reasonable doubt. There's doubts

about everything. The method in which the Government started, the method used is wrong. I have pointed out to you that they haven't given him credit for the \$25,000 that was in the box. They have stipulated to Monroe Friedman's—Judge Friedman's affidavit being admitted in evidence. But they have not taken into consideration the amount of money that he said was in there in their calculations. They admit the affidavit but they will not give credit to the contents of the affidavit. They will not give him credit for the Goodman sales, the purchase of the Goodman suits preceding this count of money. They wouldn't give him credit for the Money Back Smith transactions. They didn't want to give him credit, but finally yielded it, when it became so obvious, on the \$1,000 check.

The thing levels itself out into the same general picture, and there is no evidence here of a substantial understatement of income. And then over and above that, there is no evidence of a specific intent to evade the income tax laws of the United States, to violate those laws.

I am sure that you all will be true to your oaths as jurors to follow his Honor's instructions as he gives them to you, to apply them to this case. I am sure that you will all have the courage of your own convictions, that if you [1503] arrive at the conclusion which I think is inescapable, that there is no evidence here beyond a reasonable doubt to support this charge, the material charges made by the Government, that you will return a verdict of acquittal for this defendant; that if you feel in your own

mind that you are right, that you will stay with that opinion as long as you think you are right, and that as long as you think you are right you will stay with that opinion even though others may disagree with you. And you have that right. That is your guarantee. That is one of the supreme tenets of American citizenship. As I said earlier, for that time you are like a king—you are king for a day, because you can decide, and no one, like his Honor, wouldn't attempt to—but he couldn't if he wanted to—nor could anyone else in this world—force you to change your mind, so long as you thought you were right in the conclusion you have drawn on the evidence, and I don't think that under the circumstances that you can find evidence here to support the charges made by the Government. I think that they are shot full of doubt, reasonable doubt, and that the only verdict that could be returned properly would be a verdict of acquittal.

Excuse me.

The defendant as I said was on the stand and testified to these things. He was under strain for four days. It is [1504] an ordeal to go through that. His memory, there may have been some doubt in his memory on some things, but I think that all in all they were reasonable and truthful answers, and the errors, if any, were of a minor degree.

Mr. Whiteside is a professional witness. He is a man whose business is developing facts to be revealed on the stand under cross-examination, and he had to fall behind the cloak of "I don't remember, I don't recall." If he would do it, how much

more would we expect to come from the average individual? And this defendant is not a criminal. He has been in business over there for many, many years, and will be the rest of his life.

Mr. Olender is not a criminal that should be seized upon, as he has been in this case, liens placed against everything he owns, and he should not be put into this position. He is a citizen. This Government isn't at war on its citizens, or shouldn't be.

And, ladies and gentlemen, in closing, I would say this, you have taken your oaths as jurors. We spent considerable time in helping to select you, ten times as long as the Government did because we wanted people like you. And in parting, I leave you with this thought: The father Polonius in Hamlet, when his son Laertes was going away overseas, said, in giving him the advice that a father would to a son starting out into the world, "This above all, to thine [1505] own self be true and thou thence canst not be false to any man."

And I leave you with that thought, secure in the belief that when you return to the jury room you will come to a speedy verdict of acquittal, because this evidence is just shot through with reasonable doubt.

Mr. Drewes: It is my duty now to close.

Although it happens often, it is not easy for my colleagues or myself to sit here in a courtroom hour after hour and hear it said to us, either directly or by implication, that in a criminal trial we suppress evidence, falsify in our arguments, fail to produce documents. There is a saying, however,

among attorneys in the profession who are engaged frequently in criminal work that if you have a weak case try the agents.

I didn't realize myself, until Mr. Hagerty was well into the argument, just how weak the defense is. What are the three big issues in this case?

1, shall you credit the defendant with \$72,000 rather than \$50,000 in his beginning net worth?

2, shall you credit him with \$20,550 as the value of the Goodman suits on hand in the beginning net worth?

3, who owned the \$20,000 in bonds?

Those are the three big issues.

What part of Mr. Hagerty's argument was devoted to a [1506] considered exposition of the issues involved in those three things? Very, very little. Rather he gathered from the record a number of immaterial, inconsequential matters and expounded on them for the first hour, hour and a half of his argument. He pointed out to you that whereas the accountant Mr. Horn had testified that he had never made an audit, in truth and in fact he had filed an affidavit in which he said, some time in '47 or '48—I forget the date—"The Asturias Company was bankrupt." Well, so what? There is no contradiction there. It is completely immaterial. The word "audit" has a very real meaning in accounting terminology and in that profession. It is perfectly proper to come to a determination that a company is bankrupt without ever having made an audit. Where is the contradiction? And who cares anyway?

Then he took up the matter of the Asturias stock. He went into that at great length. The promissory note. What difference does that make? This is a net worth case. If the defendant purchased \$10,000 in Asturias stock in a given year, then he has that much income, and that's the issue and that's the point. And whether or not it was first considered as a loan, which was carefully explained to you, and is in accordance with the facts, no corporation in California may issue any stock without permission of the Corporation Commissioner. Directors and officers and promoters, [1507] if that is what they be, often are unwilling to wait the necessary time to begin operations and are unwilling to wait for the Corporation Commissioner to grant his permission, and so they accept the money and choose to treat it on their books as a loan rather than as a purchase of stock, and as soon as the permission is granted by the Corporation Commissioner then they issue the stock and cancel the loans, and that is all there is to it. The fact that Mr. Olender was given a promissory note as paper evidence of his capital contribution paying the issuance of shares which would be substituted therefor, is highly immaterial and irrelevant, and nobody pays any attention to it. To say nothing of the fact that Mr. Olender included \$5,000 worth of his Asturias stock and concealed the other \$5,000, and if he makes any contention that the stock was worthless, then it was all worthless, and the record of course shows conclusively that the corporation got into difficulties and was suspended or suspended operations in 1947 or

1948. I have forgotten which—but after the period with which we are here considering.

Mr. Hagerty stated that Mr. Olender had forgotten about the Goodman transactions, but Mr. Olender himself, by his own testimony, went to the Bank of America and purchased nine cashier checks and he remembered it sufficiently not to put it in his books. And in July of 1947, as you [1508] have in the record, he told Mr. Blanchard that he had no recollection of any such transactions, other than the \$1380 transaction which came later, and that was in his books. And in January or early in 1948 he again told Mr. Root that he knew nothing about it, although he had previously, several months before, been questioned by Mr. Blanchard, and Mr. Ringo, himself, as he testified, was unable to state now if that particular transaction or got the facts.

Mr. Hagerty has stated to you that we have not given the taxpayer credit for the \$70,000 plus, and that is all it says, "Over \$70,000," which is attested to in Judge Friedman's affidavit. He very studiously avoids telling you or referring to the fact that that affidavit states that the money was counted in Judge Friedman's presence in April of 1944, a full seven months plus before December 31, 1944. He did have the money in April—as I stated to you, in April—we accept that. But how much did he have in December 31, 1944? That's the issue. And we have given him credit for the amount he told his own accountant, Mr. Ringo, that he had.

Do you have Schedule 4 still with you? Will you note in Schedule 4 that there are a number of with-

drawals in 1944. My colleagues have calculated for me that between the beginning date of that schedule and the end of the year the withdrawals included thereon exceed over \$13,000. That would, right there in itself, account for the greater part of the [1509] difference between the \$70,000 plus and the \$50,000 by his own calculations. Those calculations for the most part, as you recall, are unexplained transfers to his personal account.

Mr. Hagerty makes a great deal over this pass-book of the Bank of America, the Fresno Branch, December 26th, 1941, \$3,000. That is all there is on it. Why, says Mr. Hagerty, didn't we take this into consideration? Why should we? What difference does it make? The taxpayer's own submitted net worth is dated December 31, 1941, and our starting point is December 31, 1944. This particular deposit from wherever it might have come, long antedates any of the matters with which we are here concerned. And, what is more important, the only gifts which the taxpayer on this trial, or to the best of my knowledge at any time ever claimed, were the ones which he testified to here, the earliest being February 3, 1942, in the amount of \$1,000. What, I ask you, does this bank account have to do with anything concerning us in this trial? Nothing.

Mr. Hagerty said with respect to Betty Olender's affidavit: There is nothing in this record to show that she knew anything about those gifts, and her affidavit, you recall, shows that she has practically no property at all as of 1939. Answer this question: Who knows whether Betty Olender knew about

those gifts? Who could testify? If there [1510] is any question about it, Mrs. Olender might so testify.

Mr. Hagerty: If your Honor please, I think that is improper argument. He is asking the jury to speculate about things that are not in evidence. He could have produced any evidence he wished on that score.

The Court: Well, the inferences may be drawn from any of the facts in evidence, if there be any. The jurors may reject the arguments of counsel, if there be no evidence to support it in the minds of the jurors. Counsel on both sides, as I have indicated, are entitled to argue the matter from their viewpoint, and, if you reject the argument, all very well and good.

You may proceed.

Mr. Drewes: Did Mr. Olender take the stand in rebuttal to testify as to whether or not he had ever told his wife anything about the gifts? He didn't. Who was the other person who might have testified—Mrs. Olender. Did the defense call her and question her as to her knowledge of the alleged \$5,000 in annual gifts? They did not. Could we call her? No. Because you all know that a wife is privileged and need not be compelled to testify against her husband. We could not call her. The defense could and saw fit, for reasons of their own, not to do so.

That leads me into the question posed by the defense as to why Goodman wasn't called. The file on this case will [1511] show that on September 10,

a subpoena was issued directing Goodman, who is now in Miami Beach, Florida, to appear. Nothing was heard till a letter to which Mr. Hagerty referred was received. The letter is dated September 12 and is stamped as having been received in the office of the United States Attorney on September 16. I am going to read it to you. It is very short:

“Chauncey Tramutolo,
“U. S. Attorney,
“San Francisco, California.

“Dear Sir:

“Mr. George Goodman is suffering with chronic asthma, and at the present time is experiencing an attack of asthmatic bronchitis precipitated by a virus infection. For the past several months he has required many injections of adrenalin, frequently given in emergency at Mt. Sinai Hospital.

“For these reasons he has been advised not to subject himself to further physical exertion, emotional stress and strain, or change in climate.”

That is signed by Jesse O. Halperin, M.D., and the address is given.

The processes of this Court, ladies and gentlemen, are open to all parties. The defendant may go to the Clerk's office and get subpoenas, turn them over to the Marshal for [1512] service, just as readily can the prosecution. Mr. Goodman could have been brought here by the defense just as readily as by us, and they would have experienced whatever difficulties we experienced.

Mr. Hagerty in his closing argument stated that

to the extent that we acknowledged that as of 1945 the \$7,000 held by Mr. Saraga for Mr. Olender should be added to the net worth of that year, and that to that extent we acknowledged the Goodman transaction. We most certainly did not. I am sure you understand that. We insist in our position that the Goodman transaction, the Saraga transaction, the Lerman transaction, have no connection whatsoever. Mr. Saraga was holding \$7,000 of money which apparently belonged to Mr. Olender. To that extent it was an asset of Mr. Olender and for that purpose should be included in the net worth of that year. Where the money came from originally, what the transaction was, we don't know.

Mr. Hagerty: If your Honor please——

Mr. Drewes: But it was no part——

Mr. Hagerty: I will object. His own witness, Mr. Leavy, said that that money was given to Mr. Saraga by him from proceeds of the transaction of the sale of Goodman suits. That is his own witness' testimony.

Mr. Drewes: It is not my recollection that he said, "Goodman suits," counsel. He just said he sold the suits. [1513]

Mr. Hagerty: Sold suits and took the proceeds east for Mr. Saraga to buy—to send further suits to the defendant.

Mr. Drewes: Be that as it may, counsel has urged upon you a rather amazing concept of the Lerman transaction. He showed you the checks. Here they are. He said: Look at the record, and then he said the bank records are public records.

Well, that's a new one to me. If any of you ever try to go into the bank and get any information about any other accounts in the banks, you wouldn't get very far. Bank records are private records, not open to public inspection, except upon proper process.

Mr. Hagerty: They are all subject to——

Mr. Drewes: I can't continue my argument, if I am going to be interrupted every two minutes.

Mr. Hagerty: His investigators went there. They were given the bank records, and, furthermore, they are not private in that they are subject to subpoena, which he could have——

Mr. Drewes: Which I was going to bring in, if you would stop interrupting me, Mr. Hagerty.

Mr. Hagerty: I don't want you to mislead the jury.

Mr. Drewes: The bank records are private records and they are not open to inspection except upon regular process.

Consider that Lerman transaction which Mr. Hagerty says [1514] was an open transaction. Do you remember Mr. Whiteside testifying as to how he discovered that transaction? The \$5,000, you will remember, was charged to the capital account.

The Court: Credit.

Mr. Drewes: ——credited to the capital account in the Army & Navy Store. He was examining the books, and of course that kind of an entry is an important entry representing a source of capital, and so he decided to trace it through. Now, how did he trace it through? He had to get the deposit

slip for that particular day, and on the deposit slip were the numbers, of course, of the cashier's checks. So then he went to the American Trust Company, he got these records, which are the daily registers of cashier checks which are issued—this is for the 14th of May, this is for the 15th of May—and by reference to these two documents he discovered that these two cashier's checks had been purchased with these two personal checks of Mr. Lerman's. Then he goes to see Mr. Lerman and asks Mr. Lerman about the transaction, and he said, well, they were drawn for the purchase of suits from Mr. Leavy. Then he goes over to Mr. Leavy and gets the two so-called Goodman invoices which are in evidence. That, counsel would have you believe, is an open transaction. It would be very difficult, it seems to me, to cover a transaction to more confuse it than there was done in this particular case. [1515]

The invoices are Goodman printed invoices, made out by Mr. Leavy for suits sold allegedly to Lerman for Olender. That is not my conception of an open transaction. Quite to the contrary.

The record shows, you will recall, that Mr. Olender borrowed \$20,000 when, according to Schedule 4, he had \$60,000 in cash. And he borrowed \$10,000 when, according to the schedule, he had \$17,000 to \$19,000 in cash in the box. Mr. Hagerty would have you believe that that is the normal act or practice of business men for the purpose of establishing credit. Rubbish. Just plain rubbish. He had been in business at the same place, as I recall, since 1928. Why would he go to the bank and borrow those large

sums, for which he would have to pay interest, if he had such large sums of money available to him within a few moments at any time he wished? He wouldn't. You know he wouldn't. The answer is he didn't have any cash in the box.

Counsel has mentioned and commented on the character testimony that you have heard. Mr. Reinhard, and I believe Mr. Leavy, too, testified in that respect. That is evidence in the case that can be considered by you. But I ask you to keep in mind, too, that the offense with which this defendant is charged, is one by the very nature of which is carried out in the dark. No one knows about it. Men who have such an evil intent don't go around telling their friends that [1516] they are defrauding the United States of its taxes. So their friends don't know about it. And men who are engaged in illicit transactions in the black market are painstaking to leave no trail behind them and they don't discuss that with their friends either. So remember in considering character testimony there are some offenses which are committed in the light of the day and if they are committed at all it is a fair conclusion that people, including those who are closest to the individual, know about them. But that is not true of these particular offenses. Everyone is always surprised when a friend gets in trouble, trouble of this kind, because by its very nature, as I say, it is unknown, it is concealed.

Now Mr. Hagerty has made much to-do about the fact that Mr. Whiteside could not remember whether he had discussed the bonds with Mrs.

Olender when he was in Fresno, and Mr. Hagerty said to you that that was the biggest issue in the case. The biggest issue in the case was not the bonds. The biggest issue in the case was the \$75,000 allegedly in the vault in Fresno, and there is also the issue of the five gifts from the mother to the taxpayer. As Mr. Whiteside testified those were the matters with which he was primarily concerned. Small wonder under those circumstances that that particular matter of the bonds might not come to mind if there was such a discussion concerning them, that they were [1517] mentioned in the discussion, after the lapse of a great number of years.

Now Mr. Hagerty would have you believe, and for very obvious reasons, that the net worth approach to the measurement of income is a very indefinite thing, it is only an approximation, and, of course, he would have you believe that it is not to be trusted. It is an approximation. There is no question about that. But it is a very close approximation, and further the net worth measurement actually tends to understate the income of the taxpayer, and there is a very good reason for that. The reason, of course, is that it is very difficult to account for personal expenditures of an individual taxpayer. Many, many expenditures are made by all of us every day and of course there is just simply no accounting possible or contemplated for personal expenditures of many kinds, and so when the net worth approach is used the personal expenditure item is bound, in the nature of things, to be conservative, because all personal expenditures

cannot under any circumstances—rather, under all circumstances, be accounted for. So although it is an approximation, it is a close approximation and the normal tendency is to understate rather than to overstate the taxpayer's income.

Ladies and gentlemen, did counsel take this matter up with you? Did he try in any way to point out to you that our reconstruction from 1941 to 1944 was wrong in any way? He [1518] didn't. He didn't because he can't. By starting back to 1941, which is his opening, the taxpayer's, sworn net worth as of that date, which was long before many of the issues before you came into existence, adding the income which he reported, deducting the taxes, we come within \$20,000 of the beginning net worth which the Government seeks to establish in this case. Now if you charge him with living expenses, which indeed you must inasmuch as he is alive and his family is alive, the \$20,000 may entirely disappear. It depends upon what you charge him with—or in large part disappear.

The government has charged him with an understatement of \$46,000. Now that is substantially correct and has not been impeached in any way. Where is room for the \$22,000 in cash in the vault which the taxpayer would have you believe he had? Where is the room for the Goodman suits? Obviously there is no room for either item in that year.

Now, ladies and gentlemen, do you believe the defendant's story of the Goodman transaction? Don't you think that he bought those suits, as the record shows, early in January, 1944, sold them

quickly and put the money back in the vault? Do you think that he had trouble disposing of them when they were good as gold, according to Lerman's testimony? Do you believe that the whole \$20,550, the entire 822 suits less the 20 allegedly sold over the counter, were sold without a penny of profit, without a penny of gain? Do you believe [1519] that he had 322 suits left almost two years later when they were as good as gold in a short market? Do you believe that he had them when, by his own testimony, he didn't include them in his federal and state income tax returns as inventory of his store? Do you believe that the inventory price of \$24.50 was a mistake? Mr. Hagerty himself stated in court, in open court before you ladies and gentlemen of the jury, it was a mistake. Mr. Olender stated himself it was a mistake. Mr. Hagerty again this morning now says it is cost or market, which ever is lower. Do you believe all those things? I don't think you do.

Do you believe that he had \$72,000 in cash in the vault? Do you believe that when he arrives at that figure by adding together what are otherwise unexplainable receipts, for which he has no record, which cannot be verified, do you think the \$72,000 is any more valid than its component parts?

Do you think Schedule 4 is valid when one error, Government bonds shown as a withdrawal \$8,000, if increased to \$9,000 would end in a minus cash result, which is ridiculous?

Do you believe he had the money when the last item shows I. Magnin and the Gray Shop as with-

drawals from the box, where the taxpayer testified he never even heard of the accounts? Who paid them? Who took the cash out of the vault? If Mr. Olender never heard of the account! Do you believe [1520] all that?

Do you believe he had the money in the vault, in the safe deposit box, when the record shows he borrowed \$30,000 in 1945 and \$10,000 in 1946? Do you believe he got that money from the estate of his deceased father when the estate tax return shows conclusively that no gifts were ever made, when the taxpayer testified that no amended return was ever filed, when the record shows that no gift tax returns were ever filed? Do you believe that he got that money by way of gift from his father when the affidavit of Betty Olender shows that as of 1939 that she has no money either in savings account or in cash or in a safe deposit box? Do you believe she wouldn't know it? Do you believe she wouldn't know that she and her husband were the fortunate recipients of that kind of money? I don't think you believe it.

What about the mother's bonds? The taxpayer testified that he returned the interest on those bonds in 1947. He states that his mother did in 1946. But you have to rely on his word alone. He states that his mother returned interest in 1948, but that was after the investigation began. Mr. Ringo testified that when he took an inventory of the contents of the box the mother's name was written on the bonds, but he wasn't sure, as I recall his testimony, whether it was a piece of paper or in an envelope

or just what it was, but that the mother's name was on it. And that was in 1948. That [1521] was long after the investigation. Do you believe that these bonds were his or do you believe that they were his mother's? The mother's bank accounts, which are in evidence, the Bank of America and the Security First National Bank in Fresno, do not reflect any transactions which could possibly be in any way tied in to the purchase of \$20,000 worth of bonds of the mother. There is no evidence in either of those records that the mother ever withdrew any such sum for that purpose or for any other purpose, for that matter. Do you believe those bonds were hers or do you believe that they belonged to the taxpayer?

Do you believe the taxpayer when he comes into Court with a detailed mathematically contrived explanation of the Goodman transaction, when in July of 1947, he told Mr. Blanchard he knew nothing about it, when in 1948 he told Mr. Root he knew nothing about it, and when his own accountant, Ringo, was unable to straighten it out?

The taxpayer, the record shows, did not include on his sworn net worth statement his wife's bank account of over \$10,000.

He did not include one item of Asturias stock.

He testified that he got \$2,500 from Mrs. Foote, which she had saved up over a period of years, and put it in the vault. It is not in the vault and the record shows that she never had any such sum of money. There is no question about [1522] it.

The taxpayer testified that he had never done any

auditing, and the Government produces a sworn affidavit that he had done auditing work and the defendant promptly impeaches the affidavit: "I didn't read it." Do you believe him?

The defendant testified in this Court under oath that he had received five different gifts from his mother on specific dates that he identified, in specific amounts which he alleged. He stated that those sums of money were taken from the Fresno bank accounts of the mother, both of which he identified when I had him on the stand. He knew one was the Bank of America and the other was Security First National, and the record conclusively shows that those gifts were never so made. Two of them went into the account of his sister, where they stayed, and the other two went into commercial accounts, and one we can't identify, and don't know what happened to it. Do you think he got those gifts? I don't see how you can.

Now, ladies and gentlemen, the constitution provides that in this country every man who is charged with crime shall be tried by a jury of his peers. You have been selected more or less by chance and under our judicial system the responsibility is now yours to pass upon the guilt or innocence of this man. You are to decide whether or not he is guilty as charged beyond a reasonable doubt. And a reasonable [1523] doubt, as I pointed out to you in my opening remarks, is just that. It is a doubt based on reason. Is there any doubt in this case in your minds? I don't think there is. But if there is any doubt, is it a reasonable doubt? Or does it require

of you the acceptance of explanations which are just beyond the ordinary experience of men?

It has been said, and I think truly, that the revenues are the lifeblood of the republic. To the extent that one man cheats, we all have to pay, and to the extent that one man cheats and gets away with it, the laws which you and I passed through our duly elected representatives, are circumvented, are flaunted, and others are encouraged to do likewise. The responsibility which is now on your shoulders is a great one. You must consider this case dispassionately, on the record, and I am convinced that when you have there is only one conclusion that you can in good conscience reach, and that is that Milton Olender is guilty as charged.

Thank you.

The Court: Ladies and gentlemen, the arguments have now been concluded, and with the consent of the jury we will resume at 1:15, thus limiting your lunch hour by forty-five minutes. But at the same time I think that it will aid in facilitating the termination of the trial, in the light of the suggestion made by counsel on both sides earlier in the day that they desired the case to be submitted today. [1524]

I will instruct you then, ladies and gentlemen, at 1:15, and thereafter you will depart for your deliberations.

The same admonition to you, not to discuss the case.

(Thereupon an adjournment was taken until 1:15 o'clock p.m. this date.) [1524-A]

Saturday, October 10, 1952. 1:15 P.M.

Instructions to the Jury

The Court: Ladies and gentlemen of the jury, before taking up the formal instructions I desire to express to you the appreciation of the Court in conforming with the suggestions that I have made on time, particularly as to today. You forgave your luncheon period to be here, and it is always refreshing and very inspiring in trying a case or any case before a jury for we see in these Courts justice at work and sometimes from the bench we can view it a little more objectively than otherwise.

The purpose of a trial is to achieve justice. I indicated that to you at the very threshold, and now I now reiterate. We approach our task without harboring passion or prejudice for or against any party to this controversy.

Merely in passing and without reflecting on any counsel or upon the defense, some mention was made that possibly there were political influences present in this controversy. I can perceive none from the position of Judge.

This matter came before the Court on an indictment. The indictment was returned by the grand jury. I will hereafter make mention of the indictment. The defendant entered a plea [1525] of not guilty. He demanded a jury trial and under the constitution he is entitled to be tried by a jury of his peers. You represent twelve people who have been duly selected and impaneled to try him.

My avowed purpose and my duty under my oath

is to give this man, and every person who comes before me, a fair trial. I hope that I have achieved it.

You in turn must give him a fair trial from your view and approach the task as I have indicated without passion or prejudice, fear or favor.

You are to be governed solely by the evidence as unfolded in this case and not by sentiment or pity.

A verdict founded upon pity or sentiment or passion would be unfair both to the defendant and to the Government and to yourselves.

Both the public and the defendant have a right to demand and they do demand and expect that you will carefully and dispassionately weigh and consider the evidence in this case and the law as I give it to you and reach your verdict regardless of the consequences.

As the instructions unfold—it isn't possible to embody all of the law in a single instruction—some of these instructions that I read to you are those that you heard before in other criminal cases in which you may have participated. Others that you may hear are particularly [1526] applicable only to this case.

There are certain fundamental rules as we announced earlier in the trial that are applicable to any criminal case, and those rules I shall give you in addition to those otherwise presented.

I ask you to consider the instructions in the light and in harmony with every other instruction given, and to apply the principles enunciated to all the evidence outlined in the case.

I ask you to distinguish carefully between the arguments of counsel and the facts testified to by the witnesses and statements made by the attorneys during the course of the trial. If there is a variance between the two, you must, in arriving at your verdict, to the extent that there is such variance, consider only the facts testified by the witnesses, and you are to remember that statements of counsel in their arguments or representations are not evidence in the case. If counsel upon either side have made any statements in your presence concerning the facts of the case, you must be careful not to regard such statements as evidence and must look entirely to the proof in ascertaining what the facts are.

On the other hand, however, if counsel have stipulated or agreed to certain facts, and there have been stipulations entered into orally and in writing, you are to regard the facts [1527] so stipulated and agreed to by counsel as being conclusively proven.

In determining what your verdict shall be, you are to consider only the evidence before you. Therefore, any statement as to which an objection was sustained by the Court and any statement which was ordered stricken out by me, must be wholly left out of account and wholly disregarded.

At times throughout the trial the Court has been called upon to pass upon questions of whether or not certain offered evidence might properly be admitted. You may recall the times when we separated and you returned to the jury room during the course of the debate on certain points of law and the admissibility of certain evidentiary matter. On those

occasions the Court sought to rule, and you are not to be concerned with the reasons, if any reasons appear to you, for my ruling.

You must accept the same under the mandate of the law and my instructions to you.

As I have indicated to you, I am in turn bound by your findings on the facts. That is exclusively and wholly your province.

To that extent we work as a sort of a team.

However, in admitting evidence to which an objection is made, the Court does not determine what weight should be given such evidence, nor does it pass upon the credibility [1528] of the witness or the witnesses.

I further charge you, ladies and gentlemen, that if the evidence in this case is susceptible of two constructions or interpretations, each of which appears to you to be reasonable, and one of which points to the guilt of the defendant, and the other to his innocence, it is your duty under the law to adopt that interpretation which will admit of the defendant's innocence and reject that which points to his guilt.

There is nothing peculiarly different in the way a jury is to consider the proof in a criminal case, than by that which men give their attention to any question depending upon evidence presented to them. You are expected to use your good sense. Consider the evidence for the purposes only for which it has been admitted, and in the light of your knowledge of the natural tendencies and propensities of men, human beings, resolve the facts accord-

ing to deliberate and cautious judgment. And while remembering that the defendant is entitled to any reasonable doubt that may remain in your minds, remember as well that if no such doubt remains, the Government is entitled to a verdict.

I charged you when you were sworn, or before you were sworn as jurors, and while you were being interrogated, that the fact that an indictment has been filed against the defendant is not to be considered by you as any evidence [1529] of his guilt. The indictment is merely a legal accusation charging a defendant with the commission of a crime. It is not, however, evidence against any defendant and does not create any presumption or inference of the defendant's guilt, and you are not to consider such fact in arriving at your verdict.

At the outset of the trial the Court had occasion, as well as counsel for the Government, to read in large measure the charging part of the indictment or the parts thereof. The indictment is broken up into four counts, and a count is, in effect, legal effect, a charge, or you might say: the first charge or the second charge. Legal terminology declares it shall be called a count. And the first count charges that on the 15th of March, 1946, that Milton Olender allegedly violated the law in the particulars therein set forth. The second count charges similarly that in that year on behalf of his wife he filed a fraudulent return. The third count pertains to the year 1947 individually on behalf of Milton Olender, and the fourth count refers to the return of his wife.

I shall not undertake to read the charging parts of the indictment nor the counts thereof. The same is on file in the Court and may be taken with you into the jury room, mindful, of course, that the indictment is merely a skeleton of the charges against the defendant, may not be [1530] considered by you as evidence, and is merely an outline of the charges.

The defendant, as I have reiterated, has entered a plea of not guilty, thereto.

I further indicate and charge you, ladies and gentlemen, that it is not necessary for the Government to prove that the defendant received income in the exact amount stated in the indictment or that the taxes due on his income were exactly as stated in the indictment. It is sufficient if you find beyond a reasonable doubt that the defendant received a substantial part of the income, which he is charged with receiving, and that he wilfully attempted to evade or defeat a substantial portion of the taxes alleged to have been due in the indictment.

The determination of a charge in a criminal case involves the proof of two distinct propositions. First that the crime charged was committed. Secondly that it was committed by the person accused therefor and on trial.

These two propositions and every essential and material fact necessary to them or to either of them must be established by the Government to a moral certainty and beyond a reasonable doubt.

In every crime there must exist a union or a joint operation of act and intent, and for a conviction

both elements must be proven to a moral certainty and beyond a [1531] reasonable doubt.

Such intent is merely the purpose or willingness to commit such act.

The defendant, Mr. Milton Olender, is presumed to be innocent of the charges made against him. This presumption of innocence attaches at the beginning of the trial. It has the weight and effect of evidence in the defendant's behalf and continues to operate in the defendant's favor throughout all stages of the trial.

When you finally retire to the jury room to deliberate upon a verdict, it becomes your duty to consider the evidence introduced in this case in the light of this presumption. This presumption is sufficient to acquit any defendant charged with a crime unless it is overcome by evidence that satisfies your mind to a moral certainty and beyond a reasonable doubt of the guilt of the accused, and unless you are not so satisfied it is your duty to find the defendant not guilty.

It is not necessary for the defendant to prove his innocence. The burden rests upon the prosecution to establish every element of the crime with which a defendant is charged to a moral certainty and beyond a reasonable doubt.

A reasonable doubt is what the term implies, a doubt based upon, founded upon reason. It means a doubt which is substantial, and not merely shadowy. It does not mean [1532] a doubt which is merely capricious or speculative. Neither does it mean a doubt born of reluctance upon the part of a

juror to perform an unpleasant duty or a doubt arising out of sympathy for a defendant or out of anything other than a candid consideration of all the evidence presented. It means a doubt which arises upon an impartial comparison and consideration of the evidence.

Without it being restated or repeated, you are to *that the* requirement that a defendant's guilt be shown beyond a reasonable doubt is to be considered in connection with and as accompanying all instructions that are given to you.

Remember, ladies and gentlemen, that the defendant is entitled to any reasonable doubt, as I have defined it for you. But at the same time also remember that if you have no such doubt, the Government is entitled to a verdict.

Section 145(b) of the Internal Revenue Code makes any person guilty of crime who wilfully attempts in any manner to evade or defeat any income tax or the payment thereof.

To prove its case the Government must establish, first that this defendant on trial received taxable income which he failed to report on his return and that therefore his tax liability was greater than that shown on the return; and, secondly, that the failure to report the alleged additional [1533] income was pursuant to a wilful attempt to evade or defeat his income taxes, and those of his wife.

It is necessary that the Government establish both elements of its case beyond a reasonable doubt. Therefore, if you have a reasonable doubt that the defendant omitted any income from his return, the

defendant is not guilty of the offense charged, and even if you find that the defendant omitted a portion of his income from his return and that of his wife, the defendant is not guilty unless you are convinced beyond a reasonable doubt that in failing to report such income the defendant willingly attempted to defeat or evade his income taxes and those of his wife.

The mere failure of a taxpayer to report a portion of his taxable income is not a crime within the meaning of section, as I have indicated, unless it has been proven beyond a reasonable doubt that he wilfully attempted to defeat or evade his income taxes or those of his wife.

The Government has presented figures allegedly representing the defendant's unreported income for the years in question based upon its computation of the defendant's net worth at the end of the years 1944, 1945 and 1946, respectively. Now you are instructed to disregard these figures and computations unless you have found or are convinced beyond a reasonable doubt that the defendant engaged in profitable transactions or activities which he failed to [1534] record on his books.

If you find that the only transactions omitted from the books are such as resulted in no profit, there has been no proof of unreported income and you should acquit the defendant.

The Government charges that the defendant omitted from the Milton H. Olender net worth statement, U. S. Exhibit 1 prepared for the revenue agents by Mr. Ringo, his attorney and accountant,

certain stock of the Asturias Export-Import Corporation as well as his wife's savings account. According to the files taken from the Bureau of Internal Revenue at San Francisco the Bureau determined that as of December 31, 1947, the date as of which the net worth statement was prepared, the stock was worthless. If you find that the defendant honestly believed that neither the worthless stock nor his wife's savings account belonged on his net worth statement, the defendant is not guilty of any wilful concealment, and you may not infer from these omissions that the defendant harbored an intent to evade his taxes in these particulars.

The Government has also adduced evidence that the taxpayer consummated several transactions involving the use of large amounts of cash. I charge you that there is nothing unlawful about the use of large amounts of currencies. If you find that the defendant did not attempt to use these transactions in any manner to conceal assets, [1535] then you may not infer any intent on the part of the defendant to evade his taxes. The possession of money alone is not sufficient to establish net taxable income. But evidence of the possession of money and the expenditure of money may be considered as a part of a chain of circumstances which you may consider in arriving at a conclusion as to whether or not the defendant enjoyed taxable income.

The Government further charges in part that the defendant in preparing the return for the partnership which sold the Riverdale Ranch reported the transaction as resulting in a loss for the partnership

when, under the applicable law the sale resulted in a capital gain. I charge you, ladies and gentlemen, that if you find that the defendant reported a loss from the sale of the ranch because he did not know, misunderstood or misinterpreted the law applicable in such a case, and not because he intended to evade his tax liability, the defendant is not guilty of any offense by reason of reporting a loss though in fact the transaction resulted in a capital gain.

The income tax law provides that the net income of the taxpayer shall be computed upon the basis of the taxpayer's annual accounting period in accordance with the method of accounting regularly employed in keeping the books of the taxpayer. But if no such method of accounting has been employed or if the method employed does not clearly [1536] reflect the income, a computation shall be made upon such basis and in such manner as in the opinion of the commissioner does fairly reflect the income.

The Government is authorized by law when the books are found to be inadequate to adopt a reasonable method of ascertaining income, and so in this case it has undertaken to find out what the defendant was worth at the beginning of the year and what he was worth at the end of the year, so as to show what he had accumulated as income in the meantime.

If at the end of the year a man has in his possession more property than he had at the beginning of the year, it goes without saying that he got it from some place, and unless he received it by gift or

inheritance or loan, it would seem that he got it by earning it, and that it was part of his income.

The Government has placed before you evidence relating to the defendant's net worth at the end of the years 1945 and 1946. A defendant's net worth for the given year is the difference between all of his assets and all of his liabilities. An increase in net worth for any year is computed by subtracting the net worth at the beginning of the year from the net worth at the end of the year.

In order to compute the defendant's taxable net income by this method, you should add the defendant's living expenditures [1537] for that year and the income taxes which he paid during that year to the increase in net worth.

These expenditures should be added because they are not represented in assets which the defendant has accumulated and are not deductible expenses.

If you find that the defendant had an increase in net worth for the years 1945, 1946 and also had a business or calling of a lucrative nature, then there is no potent testimony that the defendant had income for those years, and if the amount exceeds exemptions and deductions, then that income is taxable.

You may recall that during the course of the trial Government counsel as well as defense entered into calculations as to net worth. In addition to that defense counsel, Mr. Lewis, offered an example or exemplar in order to show the arithmetical computations as they are ordinarily computed, and the instruction I have last given to you in substance and

effect outlines in a general way the net worth theory and how it is arrived at.

Evidence may be classified as direct or circumstantial.

With respect to direct evidence, witnesses testify directly of their own knowledge as to the main facts to be proved.

With respect to circumstantial evidence proof is given of facts and circumstances from which the jury may infer [1538] other connecting facts which reasonably follow according to the common experience of mankind. Circumstantial evidence shall be accorded treatment similar to that of direct evidence in ascertaining the facts of the case.

The net worth approach of proving unreported income is an attempt to prove unrecorded income by circumstantial evidence where the Government has no direct evidence of unreported income.

Circumstantial evidence may be a basis for a conviction only if the evidence excludes every reasonable possibility or hypothesis of innocence.

Proof of the circumstances that the defendant's acquisition of assets plus his non-deductible expenditures during a given year exceeded his reported income is not inconsistent with the theory that such excess expenditures may have been made from sources other than current income, that is to say, from cash and other assets accumulated prior to the starting period or the starting point. Therefore, unless the evidence has negated beyond a reasonable doubt the possibility that the excess expenditures may have been made from prior accumu-

lations, the Government has failed to prove that such expenditures constituted unreported taxable income.

I charge you, ladies and gentlemen, that you are the sole judges of the credibility of all of the witnesses, [1539] and that includes the expert witnesses, the accountants, as well as the other witnesses.

A witness is presumed to speak the truth. This presumption, however, may be repelled by the manner in which he testifies, by the character of his testimony or by evidence affecting his character for truth, honesty and integrity, or his motives or by contradictory evidence.

You should carefully scrutinize the testimony given, and in so doing consider all of the circumstances under which any witness has testified, his demeanor, his manner while on the stand, his intelligence, the relationship which he bears to the Government or the defendant, the manner in which he might be affected by the verdict, and the extent to which he is contradicted or corroborated by other evidence, if at all, and every matter which tends reasonably to shed light upon his credibility.

The good character of a person accused of crime when proven is itself a fact in the case. It is a circumstance tending in a greater or lesser degree to establish his innocence. It must be considered in connection with all of the facts and circumstances of the case and may be sufficient when so considered in itself to raise a reasonable doubt of the defendant's guilt.

But if after a full consideration of all the evidence adduced the jury believes the defendant to be guilty of the [1540] crime charged, they should so find notwithstanding proof of good character.

If you should find that there are discrepancies or inconsistencies existing in the testimony of any witness or between the testimony of any witness or witnesses or if you should find yourself disagreeing over various issues, real or apparent, you should then ascertain whether or not such discrepancies or inconsistencies or such points of difference affect the true issues in this case.

Examine such discrepancies or inconsistencies and such disputed points and ask yourself these questions:

How does the situation of this or that or the other discrepancy or matter in dispute affect the guilt or innocence of the defendant?

Regardless of what may be the truth concerning such discrepancies or inconsistencies, ask yourselves the main question:

Did or did not the defendant commit the charges as alleged in the indictment?

Is such discrepancy or such disputed point material to establish the main and material issue of fact as to the guilt or innocence of the defendant?

If they are not material, if the decision of the same is not necessary to enable you to arrive at a verdict of the guilt or innocence of the defendant, then such [1541] discrepancies or disputed points are immaterial and minor matters and you should

waste no further time in discussing or considering them.

A witness may be impeached by the party against whom he was called by contradictory evidence, by evidence that he or she has made at other times statements inconsistent with his present testimony.

If you believe that any witness has been impeached, then you will give the testimony of such witness such credibility, if any, as you may think it entitled to.

The defendant in this case has testified in his own behalf. That being so, you will determine his credibility according to the same standards applied to any other witness. These standards I have already pointed out to you.

You may also consider in this connection the interest the defendant may have in the case, his hopes and his fears, and what he has to gain or lose as the result of your verdict.

In determining the honesty of a defendant's intentions, you may weigh his own statements on the one hand as against the actions and conduct on the other hand.

There has been testimony in this trial which, if believed by you, would warrant you in finding that the defendant, Milton Olender, asserted at the trial a much more detailed recollection of transactions with George Goodman that he had admitted on earlier occasions. If [1542] you should find as a fact that such is the case, you are warranted in considering this fact in determining the truth or

falsity of the defense's account at the trial with respect to the Goodman transactions.

The defendant has testified that he did not include the Goodman suits in the inventory of December 31, 1944, as reported on his 1944 federal income tax return. I charge you that if you find that his failure so to do was intentional or wilful, then it was improper and unlawful.

Under the federal law the individual taxpayer making a return of his income tax to the United States certifies under the penalty of perjury that he believes that the figures included therein are true and correct. It was therefore unlawful for the defendant to omit the Goodman suits from the inventory reported on his return, if he did so with criminal intent to evade his tax liability.

However, the defendant in this case is not charged specifically with filing a false inventory as of December 31, 1944, and you cannot find him guilty of any of the offenses charged in this indictment because you find he was guilty of another offense not included in the indictment herein.

If you find that the defendant had no Goodman suits on hand as of December 31, 1944, then you need not consider this instruction. But if you should believe that the defendant did have suits, Goodman suits, on hand as of December 31, [1543] 1944, then you may consider defendant's failure to include them in his December 31, 1944, inventory in determining the question as to whether the defendant intended to evade and defeat income taxes as charged in the indictment.

I further charge you, caution you, ladies and gentlemen, that evidence of oral admissions of a defendant are to be received with caution. Evidence is to be estimated not only by its intrinsic weight but also according to the evidence which is in the power of one side to produce and the other side to contradict, and therefore if weaker and less satisfactory evidence is offered, when it appears that stronger and more satisfactory was within the power of the party, the evidence offered should be viewed with distrust.

You are not bound to decide in conformity with the declarations of any number of witnesses which do not produce conviction in your minds against a lesser number or against a presumption of law or other evidence satisfying your minds.

In other words, it is not the greatest number of witnesses that should control your judgment or your deliberations against a less number whose testimony does satisfy your minds and produces a moral certainty and moral conviction that they are telling the truth. It is upon the quality of the testimony rather than the quantity or [1544] the number of witnesses that you should act, provided it produces in your minds moral conviction and satisfies you of its truthfulness.

With respect to expert testimony, many accountants, expert and skilled in the art and science of accounting, have appeared before you, and in several instances they have differed in sharp and bold relief. As I have announced to you, you are to analyze their testimony, consider it in the light of

the facts of the case as they have unfolded it and in the light of their examination and cross-examination.

I further charge you that the computations made by an expert are for the convenience of both sides in presenting the case for your convenience.

You are not bound by the computations or other testimony of an expert witness, but you should give such testimony the weight to which you will determine it is entitled in the light of the other proof in the case and also with reference to your conclusion as to whether or not the facts on which the particular expert's testimony was based have been established by the necessary degree of proof.

I further charge you ladies and gentlemen that if a witness is shown knowingly to have testified falsely on the trial touching any material matter, that is, any fact which tends to prove or disprove the defendant's guilt or innocence, the jury has a right to distrust such [1545] witness' testimony in other particulars, and, in that case, you are at liberty to reject the whole of the witness' testimony, except insofar as he has been corroborated by other credible evidence or by facts and circumstances proved on the trial.

You are further instructed that when in the trial on charges of income tax evasion discrepancies between the defendant's return and his actual income are indicated by the Government's proof, the failure of the defendant to offer explanation in any form may be considered by you in arriving at your verdict.

If you find that the defendant herein had substantial taxable income for the year 1945 or 1946 or in both years, which he did not report on his income tax return, then you will find that there was a substantial amount of tax due to the United States Government for those years.

The same principle applies to the accounts involving the defendant's wife, Mrs. Betty Olender.

If the defendant intentionally handled his income so as to avoid making an accurate record of such income and then filed a return to his knowledge which substantially understated his income and the tax evasion motive played any part in such conduct, the offense charged may be made out even though the conduct may also have served other purposes, such as concealment of other wrongdoing. [1546]

Every person, except wage earners and farmers, liable to pay income taxes is required to keep such permanent books of account and records as are sufficient to establish the amount of his gross income and the deductions, credits and other matters required to be shown in any income tax return.

The duty to file this return is personal and it cannot be delegated.

Bona fide mistakes should not be treated as false and fraudulent. But no man who is able to read and write and who signs a tax return is able to escape the responsibility of at least good faith and ordinary diligence as to the correctness of the statements which he signs whether prepared by him or somebody else.

Wilfulness is charged in the indictment. As you

may observe each count states that the defendant did wilfully and knowingly defeat and evade large parts of the income tax due and owing by him, et cetera. Now what does "wilfulness" mean as an essential element of the offense charged in each of the counts? "Wilfulness" means a specific wrongful intent to evade the tax. Therefore, unless you find beyond a reasonable doubt not only that a false return has been filed but that the defendant filed or caused the return to be filed with the knowledge that it was false and with corrupt and criminal intent to evade his obligation, you must acquit [1547] the defendant.

The gist of the offense charged in the indictment is a wilful attempt on the part of a taxpayer to evade or defeat the tax imposed by the income tax law. The word "attempt" as used in this law involves two elements, one, an intent to evade or defeat the tax and, secondly, some act done in furtherance of such intent.

The word "attempt" contemplates that the defendant had knowledge and understanding that during the years 1945 and 1946, or either of them, he had an income which was taxable and which he was required by law to report, and that he attempted to evade or defeat the tax thereon, or a portion thereof, by purposely failing to report all the income which he knew he had during such years and which he knew it was his duty to state in his return for such years.

There are various schemes, subterfuges and devices that may be resorted to evade and defeat the

tax. The one alleged in this indictment is that of filing a false and fraudulent return with the intent to defeat the tax or the tax liability. The gist of the crime consisted in wilfully attempting to escape the tax.

The attempt to evade and defeat the tax must be a wilful attempt. That is to say it must be made with the intent to keep from the Government a tax imposed by the income tax law which it was the duty of the defendant to [1548] pay to the Government.

The attempt must be wilful. That is intentionally done with the intent that the Government shall be defrauded of the income tax due from the defendant.

The presumption is that a person intends the natural consequences of his acts and the natural presumption would be if a person consciously, knowingly or intentionally did not set up his income and thereby the Government was cheated or defrauded of taxes, that he intended to defeat the tax.

I further charge you that it is not necessary for the Government to offer direct proof of wilfulness. It is a rare case in which the defendant has said to a witness that he did certain acts with the purpose of evading his tax liability. In making your decision, therefore, as to whether or not the acts tending to conceal defendant's true tax liability was wilful, you may consider all the circumstances of the case, you may infer wilfulness from the kind of evasion, if any, which you find defendant com-

mitted, from his opportunity to know the true amount of his net income, and from such other facts which point to the existence or non-existence of a criminal state of mind in the defendant.

I further charge you, ladies and gentlemen, that a man may not shut his eyes to obvious facts and say he does not know. He may not close his observations and knowledge to things that are put out in the open and are obvious to him, [1549] and say, "I have no knowledge of those facts." He must exercise such intelligence as he has, and, if the evidence shows that he intended to conceal tax liabilities from the Government, then of course, he was not acting in good faith.

This question of intent is a question you must determine for yourselves from a consideration of all the evidence.

It is for the Government to prove that the defendant did some act which tended to understate his tax liability, such as a failure to record a certain transaction or reporting a loss from a sale which in fact resulted in a taxable gain. In addition, as I have indicated to you, the Government must prove beyond a reasonable doubt that the act was wilfully done, that is, with criminal intent to defraud the Government of a tax which the defendant knew was due from him.

I have reached the concluding phases of my instructions, ladies and gentlemen. I only have one or two additional instructions and cautionary comments to make. The jury is composed of twelve

persons and, as you know, your verdict must be unanimous in a criminal case. All twelve jurors must agree before a verdict may be reached. And while your verdict should represent the opinions of each individual juror, it by no means follows that opinions may not be changed by conference in the jury room. The very object of the [1550] jury system is to secure unanimity by a comparison of views and arguments among the jurors themselves. Each juror should listen with a disposition to be convinced to the opinions and arguments of the others. It is not intended that a juror should go to the jury with a fixed determination that the verdict shall represent his opinion of the case at that very moment. Nor is it intended that he should close his ears to the arguments of other jurors who are equally honest and intelligent with himself.

The attitude of jurors at the outset of their deliberations is important. It is seldom helpful for a juror upon entering the jury room to make an emphatic statement or opinion on the case or to announce a determination to stand for a certain verdict. When a juror does that at the outset, individual pride may become involved and he or she may hesitate to recede from an announced position even when later shown that it is incorrect.

You are not partisans. You are the judges, judges of the facts. You have the same responsibility in this court as I have. Your sole obligation, however, is to ascertain the truth from the facts as they are unfolded and to apply reason and common sense to the evidence in this case. You need not be great

logicians. You need not be great accountants. Apply to the facts in this case the same common sense and judgment that you would apply to the [1551] ordinary routine affairs of your own lives, in the light of the evidence as it unfolded and in the light of the testimony offered.

And I further charge you, ladies and gentlemen, that you will make a definite contribution to the administration of justice if you will arrive at an impartial verdict in this case.

The indictment contains four counts. Each count must be considered by you as a separate and several charge against the defendant, and according to such view as you may take of the evidence you shall return a verdict of either guilty or not guilty on each charge.

Your verdict, as I have already indicated, must be unanimous.

Further, as a caution to you and without intruding myself upon your particular functions, may I ask you not to concern yourselves with the matter of punishment of the defendant in the event of a verdict of guilty. The matter of punishment is for the Court alone and your province is to determine the guilt or innocence of the defendant.

The Clerk of the Court has prepared for your convenience a form of verdict:

Title of Court and cause—"We, the Jury, find Milton H. Olender, the defendant at the bar, as follows"— [1552] there is a blank as to count 1, blank as to count 2, blank as to count 3, blank as to count 4, and a line for the signature of the foreman.

In each space, allotted space provided, you may include therein when you so find, if you do find, either guilty or not guilty as it may appear to the jurors, in accordance with your findings.

When you retire to the jury room to deliberate, select one of your number as the foreman or forelady, and he or she will sign your verdict for you when it has been agreed upon, and he or she will represent you as your spokesman in the further conduct of the case in court.

I further caution you that if it becomes necessary for the jury to communicate with the Court during its deliberations or upon its return to the Court respecting any matter connected with the trial of the case, the jury should not indicate to the Court in any manner how the jury stands numerically or otherwise upon the issues submitted to the jury. This caution the jury should observe at all times after the case is submitted to it, and until the jury has reached a verdict.

Gentlemen, under the Rules of Criminal Procedure it is now your duty to note any exceptions in the record to any of the specific instructions I have given to this jury and the rule provides that it is to be done out of the presence of the jury. I will suggest, therefore, that we [1553] recess momentarily to my chambers. If you have any such exceptions, they may therein and there be noted by the reporter and we may then return to court.

The procedure shouldn't take very long, and, ladies and gentlemen, may I ask you during this procedural process and while the counsel are engaged

in making their records in connection with my instructions that you not leave the jury box. The case is not submitted to you until this motion has been performed, and, as I have indicated, it should not take very long.

(The following proceedings outside the presence of the jury.)

The Court: Take them up by number, as suggested in your proffered instructions, or by label on the instruction, giving a brief resume of what it may be. That would suffice for the record. There is no occasion to make any arguments. Just to protect your record. I think I covered in substance the general instructions offered. I may not, however.

Mr. Drewes: For the United States, your Honor, there are no exceptions. However, we think that it might be wise if the Court would instruct the jury that they may find on counts individually. Occasionally in the past it has caused a certain amount of trouble.

Mr. Hagerty: The defendant would object to the [1554] Government's supplemental instruction. I don't have the number on it but it starts out with "There has been testimony in this trial which if believed by you would warrant you in finding" and so forth, "That the defendant had a better memory of the Goodman deals at certain other times than others."

The Court: Based on the case—what is the case?

Mr. Hagerty: Based on *Interstates versus Horn-*

stein. I don't think the case supports it and I think it is an argumentative instruction.

The Court: The exception may be noted.

Mr. Hagerty: Then there is another instruction. I believe it is a supplemental instruction based upon an instruction given in the case of the United States versus Port in this Court, which I feel again is pure argument and there is no proper authority for its granting.

The Court: The exception may be noted.

Mr. Hagerty: There is another instruction wherein it starts that "Where there is a failure of the defendant to offer a proper explanation of his income"—or something—I don't think it is applicable to the facts of this case. I think there was an explanation so I object to it on that ground and also that it is argumentative. I don't know the number.

The Court: The exception may be noted. [1555]

Instruction number 5, based on Bell versus United States—that was the last one you referred to?

Mr. Hagerty: Yes, that's right, your Honor.

And then at this time I believe from a procedural matter or standpoint the only thing we have at this time is the exception to the instruction. We do not again enunciate our motions for judgment of acquittal or anything of that sort.

The Court: You might safeguard the record, and if you wish I will hear you.

Mr. Hagerty: Well, this time I would then again renew the motions made at the close of the

evidence in the trial, that is, for the granting of the mistrial based upon the admission of what we felt was prejudicial evidence in connection with the Laura Foote pension; also for the admission of the evidence from the witness Ringo based upon a violation of the confidential relationship existing between attorney and client.

The Court: That is also motion for judgment of acquittal?

Mr. Hagerty: And also a motion for judgment of acquittal.

The Court: Motions and each of them, severally and individually, are denied.

Mr. Hagerty: And at this time, as I also made a motion [1556] that failing the judgments and motions for mistrial, that the evidence should be stricken from the record. So for the record I again make that motion.

The Court: The motion to strike is denied.

Mr. Hagerty: And then of course the other motion I made, I believe it was the motion that judgment of acquittal be granted as to the year 1946 on the ground that there is no evidence of a substantial understatement of income.

The Court: The motion is denied in that respect.

Are there any motions that occur to you, Mr. Lewis?

Mr. Lewis: No.

The Court: Is the record clear?

Mr. Drewes: Just for the record, your Honor, in Court a day or so ago counsel for the defendant

in connection with the instruction based upon United States against Port, suggested certain changes in the terminology at that time. I understood that they had agreed that the instruction might be given.

Mr. Hagerty: That unfortunately, for the purpose of the record, was a misunderstanding between co-counsel on my side. I am sorry about it. I did at that time, at a quick glance, notice that wording and ask that it be stricken, but my brother counsel—— [1557]

The Court: I recall that incident, and either counsel, either Mr. Lewis or Mr. Hagerty, did make a suggestion as to certain terminology in the instruction, as follows——

Mr. Hagerty: From “knowingly” to “with intent to”——

Mr. Shelton: “With criminal intent” are the words.

Mr. Hagerty: I saw the word “knowingly” wind up the end of the paragraph and immediately objected to it. Further study indicated that we couldn’t approve of the instruction despite the amendment, and I believe I spoke to Mr. Magee, the clerk, or we discussed something before the Court and as an oversight at the finish of my argument—I was going to call it to the Court’s attention again, but I didn’t this morning.

The Court: The language which was added appears at line 13, 14 of the proffered instruction and the following was added “with criminal intent to evade his tax liability.” In the initial instruction

offered by Mr. Drewes and Mr. Shelton the word "knowingly" was used without the added language. However, the record may show that by suggesting the additional terminology and language that defense counsel did not accede in the construction of the section nor in the construction of the proffered instruction nor in the giving thereof by the Court and did not waive any of their rights therein to hereafter subject the instruction to any attack under the law. So that preserves your rights. [1558]

(The following proceedings in the presence of the jury:)

The Court: Ladies and gentlemen, the court's attention has been directed to the form of verdict and I might add that the jury may arrive at a verdict of guilty or not guilty as to count 1; they may disagree as to count 2, as it may appear. In short, there need not be unanimity as to all of the counts. That is to say, they may agree as to count 3 of the counts and disagree as to count 1 of the counts, or any number thereof.

The case is now submitted to you ladies and gentlemen, and the Clerk of the Court if the counsel has had opportunity to examine the exhibits, the Clerk will bring to you all of the exhibits in the case, and you may now retire to your deliberations.

(Thereupon at 2:25 o'clock p.m. the jury retired to their deliberations.)

(The following proceedings had outside the presence of the jury at 5:12 o'clock p.m.)

The Court: I have received a communication from the jury, gentlemen:

“Please bring in transcript in regard to loan of \$30,000 and \$10,000 loans.”

I have requested the reporter to find the reference in the transcript and he has found the testimony of Mr. Carroll, [1559] both direct and cross.

Will you, counsel, indicate if that represents the reading?

Mr. Drewes: It does. I believe it is appropriate to include the first three lines on page 1226.

Mr. Lewis: If your Honor please, I just arrived. I haven't had the opportunity to completely peruse it.

The Court: May I ask counsel on all sides to be present or to have some representative present. In view of the demands made by the jury from time to time, it is very difficult to meet these demands, and that we have counsel available, in court, someone present, and it need not be you, Mr. Drewes, or you, Mr. Hagerty, but someone in court so we can get these things formulated.

All right.

Mr. Drewes: The direct examination consists of only four pages, your Honor, that covers this.

(The following proceedings had in the presence of the jury.)

The Court: The jury is present.

Ladies and gentlemen of the jury, your foreman has presented to the Court through the attaches of the Court a request as follows:

“Please bring in transcript in regard to loan of \$30,000 and \$10,000 loans.” [1560]

Under the rules the Court is unable to send into the jury room a copy of the transcript in whole or in part. When a request is made for a particular part of the transcript, the reporter is able to find it and we will have it read in open Court. Now the reporter has found this reference and may I ask you, Mr. Reporter, to read that reference to the jury.

(Whereupon the reporter read transcript pages 1222 through line 3 on page 1226.)

The Court: Any request for additional reading on that subject?

Mr. Hagerty: Yes, your Honor. I understood you to ask me if we felt——

The Court: If you had any additional material.

Mr. Hagerty: Yes, I think there is. Excuse me just a minute. Mr. Lewis has found these citations in here, the testimony beginning at page 863, volume 11 of the bookkeeper Vera Manger, in relation to this same transaction, beginning at line 10. I think we will pick up the thought from there, proceeding on through the following page, line 15, line 19.

Mr. Shelton: If your Honor please, may the Government hand up a copy to your Honor before that is read to see whether that is material on the question?

Mr. Drewes: The materiality is not apparent to me, your Honor. [1561]

The Court: I have read the suggested material

as indicated. I can't see any particular relevancy to this matter. I may be wrong.

Mr. Hagerty: The date is the same, your Honor, and it involves and it refers to the application for that loan and outlines the purpose.

Mr. Shelton: Maybe I am incorrect——

The Court: Page 863 at line 10:

(Reading from line 10, page 863, to line 14, of page 863.)

Mr. Lewis: The next item, your Honor, is the item involved——

The Court: (Reading on page 863, from line 14, page 864, line 15.)

Mr. Lewis: Now just go to the end of that page.

The Court: (Reading page 864, line 16, to line 25, page 864.)

Mr. Lewis: In other words, the application shows that the money was borrowed for purchases, uniforms, and he sent out checks and deposited the Government security in order to have the money in case those checks were cashed.

The Court: Well, in any event, however, the record is approached, loans were made on the dates in question and security was posted in the amounts indicated. That is the record.

Mr. Hagerty: Yes, your Honor. [1562]

The Court: Are there any further matters now?

Mr. Drewes: None on behalf of the Government, your Honor.

Mr. Hagerty: No, that completes the picture of the transaction, your Honor.

The Court: Does that satisfy the request of the foreman?

The Foreman: Yes, sir.

The Court: I suggest you return then for further deliberations.

(The jury returned for further deliberations at 5:32 p.m.)

(5:42 p.m., the following proceedings in the presence of the jury.)

The Court: Ladies and gentlemen of the jury, did you reach a verdict?

The Foreman: Yes, your Honor.

The Court: Would you present the verdict to the marshal, please.

Read the verdict, Mr. Clerk.

The Clerk: Ladies and gentlemen of the jury, hearken unto your verdict as it shall stand recorded:

“We, the jury, find as to Milton H. Olender, the defendant at the bar, as follows:

“Guilty as to count 1, guilty as to count 2, guilty as to count 3, guilty as to count 4. Signed Edward C. Chew, [1563] Foreman.”

So say you all?

(Affirmative reply.)

The Court: You wish the jury polled?

Mr. Hagerty: Yes, your Honor.

The Court: Would you poll the jury, Mr. Clerk?

(Thereupon the jury was polled, response unanimously in the affirmative.)

The Clerk: The verdict is unanimous, your Honor.

The Court: The verdict here may be entered of record and judgment of conviction entered thereon.

Ladies and gentlemen of the jury, after the passage of some four weeks in the trial of this case I think it only fair that the Court indicate to you that your verdict is the inevitable result of a fair and dispassionate review of the evidence, and if I had been permitted to join with you I would have joined in the verdict. I, as a Court recognize the difficulty attendant upon a body of twelve persons reviewing a record of this magnitude. It has not been an easy job for you, and I wish to compliment you, as the Court and on behalf of these Courts, for your constructive effort in the administration of justice.

The jury is excused until further notice.

(The following proceedings outside the presence of the jury.) [1564]

The Court: Will the defendant arise. Have you anything to say at this time why judgment and sentence should not be pronounced?

Mr. Hagerty: Yes, your Honor. At this time we feel that we would like to make certain motions in reference to a new trial on the various grounds that we can by statute. We should also like to make a motion for judgment for acquittal notwithstanding the verdict. That's all the motions I make right at this time, your Honor.

The Court: Counsel?

Mr. Drewes: I have no statements to make opposing the motions.

The Court: The matter may stand over then until the following week in order to provide counsel an interval in which to make the motions indicated.

Mr. Hagerty: At this time too we would like to ask that the defendant be permitted to remain on bail pending the outcome of the determination of those motions.

The Court: What is the bail? What is the amount?

The Defendant: \$1,000.

The Court: Do you have any objection?

Mr. Drewes: Submit the matter, your Honor.

The Court: I have no objection if the defendant remains at large pending a determination of the motions. He is a resident, I assume, of many years in Oakland? [1565]

Mr. Hagerty: Yes, your Honor. We feel that as far as bail is concerned, it is adequate since he is a family man, owns his own home, has his own business.

The Court: Yes, I think that is adequate. Will you indicate a date to the Clerk?

(Thereupon followed discussions between Court and counsel relative to setting of date on hearing for motions.)

The Clerk: October 14th on hearings for motions.

(Thereupon the Court adjourned.) [1566]

Proceedings on Judgment and Sentence

Before Judge George B. Harris

Monday, November 10, 1952, 9:30 A.M.

(At the time of judgment and sentence the following were present: the defendant, with his counsel, Emmet F. Hagerty, Esq., and John V. Lewis, and Assistant United States Attorney Robert J. Drewes.)

The Clerk: United States vs. Olender for judgment.

The Court: This is the time for the pronouncement of judgment and sentence in the matter of United States vs. Milton H. Olender. Does the defendant at this time have anything to say why judgment and sentence should not be pronounced against him?

Mr. Hagerty: No, there is no legal cause, your Honor, and I believe your Honor is in possession of the presentence report, which is in the nature of a motion for probation.

The Court: Yes, I have, Mr. Hagerty, the presentence report and the recommendations, the letters from the governmental agency, the revenue service. The report is rather comprehensive and embodies a number of letters written on behalf of Mr. Olender. It appears that Mr. Olender has written to his many friends requesting that they submit on his behalf letters of commendation or recommendation. I understand that there are many letters filed with the probation office. I have read many of them.

The recommendation submitted to this court is [1*] against probation, and after a very thorough review of the file as well as the trial I must agree with the recommendation. Accordingly, it is the duty of the Court to sentence the defendant. Heretofore, after a trial by jury, the defendant was convicted on four counts in an indictment. The trial was a lengthy one, and according to the report before me, the investigation antedating the trial was a very lengthy and burdensome one.

Milton Olender, it is the judgment and sentence of this Court that on the first count of the indictment under which you have been heretofore convicted, you be confined in a federal penitentiary for the term of three years and pay a fine to the government in the amount of \$10,000.

As to the second count of said indictment under which you have been heretofore convicted, similarly it is the judgment and sentence of this Court that you be confined in a federal penitentiary for the term of three years and pay a fine to the United States Government in the amount of \$10,000.

With respect to the third count, similarly, it is the judgment and sentence of this Court that you be confined in a federal penitentiary for the term of three years and pay a fine to the government in the amount of \$10,000, all sentences on each of said counts, and all of said counts to run concurrently and not consecutively.

With respect to the fourth count, it is the judgment of [2] this Court that you pay a fine to the

*Page numbering appearing at top of page of original Reporter's Transcript of Record.

United States Government in the amount of \$10,000, which said sentences shall run consecutively with and not concurrent; that is to say, the total sentence is three years confinement in a federal penitentiary and a fine to be paid to the United States Government in the sum of \$20,000. Do you want a stay?

Mr. Hagerty: Yes. At this time we would like to serve a notice of appeal and serve copies on the United States Attorney, and we would ask for a stay of execution in reference to the fines pending the determination of the appeal. We would also ask your Honor to set bail on appeal to permit the defendant to remain out of custody.

Mr. Drewes: We will submit the matter, your Honor.

The Court: To the fines, I will grant a fifteen day stay. You have filed your notice of appeal, have you?

Mr. Lewis: Yes.

The Court: Do you have any suggestion as to bail, Counsel?

Mr. Drewes: No, your Honor.

The Court: What is the bail now?

Mr. Lewis: The bail is \$1,000. The Government has, I would say, approximately three or four hundred thousand dollars worth of property which the Government has levied on, and the defendant has appeared voluntarily in every case. I think that should be taken into consideration by your Honor in letting him on bail. I do not think the defendant is going to run away. [3]

The Court: There has been a lien levied upon

his property, as I read the record. Therefore, I think the bail should be in an amount proportionate to the amount of the security the Government has on the lien. I will allow bail pending determination of the appeal in this case in the amount of \$2,500.

Mr. Hagerty: Thank you, your Honor.

The Court: I grant a fifteen-day stay. [4]

[Title of District Court and Cause.]

CERTIFICATE OF CLERK TO TRANSCRIPT
OF RECORD ON APPEAL

I, C. W. Calbreath, Clerk of the United States District Court for the Northern District of California, do hereby certify that the foregoing and accompanying documents and exhibits, listed below, are the originals filed in the above-entitled case, or true copies thereof, and that they constitute the record on appeal as designated by the attorneys herein:

Indictment.

Minutes of March 11, 1952.

Minutes of April 8, 1952.

Minutes of September 19, 1952.

Minutes of September 22, 1952.

Minutes of September 23, 1952.

Minutes of October 8, 1952.

Minutes of October 10, 1952.

Minutes of October 14, 1952.

Plaintiff's instructions given.

[Endorsed]: No. 13658. United States Court of Appeals for the Ninth Circuit. Milton H. Olender, Appellant, vs. United States of America, Appellee. Transcript of Record. Appeal from the United States District Court for the Northern District of California, Southern Division.

Filed December 12, 1952.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for
the Ninth Circuit.

In the United States Court of Appeals
for the Ninth Circuit

No. 13658

MILTON H. OLENDER,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

STIPULATION RELATIVE TO EXHIBITS
AND RECORD ON APPEAL

It Is Hereby Stipulated by and between counsel for the respective parties hereto, that all of the Government Exhibits 1 through 66 inclusive, including those marked for identification, and all of defendant's Exhibits A through AQ, inclusive, including those marked for identification, need not be set forth in the Reporter's Transcript or in the printed

record on appeal, but the same shall be deemed to be included therein as part of said transcript and printed record on appeal with the same effect in all respects as if included in and set forth in said record on appeal; and

It Is Hereby Further Stipulated, that all of the Exhibits of both the plaintiff and defendant herein, including those marked for identification, together with the record on appeal, be transmitted by the Clerk of the District Court to and filed in the office of the Clerk of the United States Court of Appeals for the Ninth Circuit, and that such of said designated Exhibits that any of the parties to the above action may deem material, may be printed in the Brief, or Briefs, of such parties or in an appendix or supplement thereto or described in said Briefs with like force and effect as if said designated Exhibits were set forth in full in said Reporter's Transcript or printed record on appeal.

Dated: January 7th, 1953.

CHAUNCEY TRAMUTOLO,
United States Attorney.

By /s/ ROBERT J. DREWES,
Assistant United States At-
torney.

/s/ LEO R. FRIEDMAN,
Attorney for Defendant,
Milton H. Olender.

So Ordered:

/s/ WILLIAM DENMAN,
Chief Judge.

/s/ /WM. HEALY,

s/ WALTER L. POPE,
United States Circuit Judges.

[Endorsed]: Filed January 14, 1953.

[Title of Court of Appeals and Cause.]

APPELLANT'S STATEMENT OF POINTS TO
BE RELIED UPON ON APPEAL AND
DESIGNATION OF RECORD ON APPEAL

Comes now appellant above named and advises the Court that on his appeal he intends to rely upon each and all of the following points, to wit:

1. Insufficiency of the evidence to establish each or any of the charges or to support the verdicts and/or judgments on each of the charges contained in the indictment.

2. That the District Court and the Judge thereof erred in denying appellant's motion at the conclusion of all the evidence in the case for judgments of acquittal as to each count of the indictment.

3. That the verdict as to each count of the indictment is contrary to the weight of the evidence.

4. That the verdict as to each count of the indictment is not supported by substantial evidence.

5. That the Court erred in admitting in evidence on behalf of the Government and over the objection of appellant, the testimony of Government's witness Charles R. Ringo.

6. That the Court erred in denying appellant's motion to strike out all of the testimony of Government's witness Charles R. Ringo and of all Exhibits introduced in evidence during the testimony of said witness.

7. That the Court erred in sustaining an objection of the Government to the following question asked of the witness Charles R. Ringo by appellant on the voir dire examination of the witness Charles R. Ringo, to wit: "And at that time the relationship of attorney and client was set up?"

8. That the Court erred in denying the offer and request of appellant during the voir dire examination of Government's witness Charles R. Ringo, to then put the defendant and appellant on the stand in order that he could testify as to his version and understanding of the relationship existing between Charles R. Ringo and appellant.

9. That the Court erred in admitting in evidence over the objection of appellant, United States Exhibit No. 45.

10. That the Court erred in admitting in evidence over the objection of appellant, the testimony of the witness Melbourne C. Whiteside, a Government witness, to the effect that as a result of checking the bank records in Fresno and discussions had

with Mrs. Molly Olender, he had made a determination that six items claimed by appellant to be sums of money made to him as a gift by his mother, were not in fact made.

11. That the Court erred in admitting in evidence over the objection of appellant, United States Exhibit No. 55.

12. That the Court erred in instructing the jury as follows:

“There has been testimony in this trial which, if believed by you, would warrant you in finding that the defendant, Milton Olender, asserted at the trial a much more detailed recollection of transactions with George Goodman that he had admitted on earlier occasions. If you should find as a fact that such is the case, you are warranted in considering this fact in determining the truth or falsity of the defense’s account at the trial with respect to the Goodman transactions.”

13. That the Court erred in instructing the jury as follows:

“You are further instructed that when in the trial on charges of income tax evasion discrepancies between the defendant’s return and his actual income are indicated by the Government’s proof, the failure of the defendant to offer explanation in any form may be considered by you in arriving at your verdict.”

14. That the Court erred in admitting in evidence over the objection of appellant, the consent

judgment rendered in the OPA suit brought against appellant.

Appellant Olender designates the entire record, including the opening and closing arguments of the Government to the jury but omitting therefrom defense counsel's argument to the jury, be printed in that he believes that all thereof is necessary to fully support and present his appeal and that the Exhibits introduced in the trial and which have been sent to the Clerk of this Court of Appeals be considered and that the stipulation relative to said Exhibits and their use on this appeal on file in the above Court, be printed in the record.

Dated: January 15th, 1953.

/s/ LEO R. FRIEDMAN,
Attorney for Appellant.

Receipt of copy acknowledged.

[Endorsed]: Filed January 15, 1953.